SUPREME COURT OF THE UNITED STATES.

No. 14, Original.—October Term, 1925.

Commonwealth of Massachusetts, Complainant,
vs.
State of New York, et al., Defendants.
} In Equity.

DECREE.

[June 7, 1926.]

This cause coming on to be heard on the bill of complaint, the answers of the several defendants, and upon the pleadings and proofs as well as upon the report of Wade H. Ellis, Esquire, the Special Master appointed by this Court to take proofs and make report to this Court in this cause, and the arguments of counsel thereupon had; therefore for the purpose of carrying into effect the conclusions of this Court as stated in its opinion filed herein April 12, 1926,

It is now here Ordered, Adjudged, and Decreed, by this Court, *First:* That in and by the agreement duly entered into between the Commissioners of the State of New York and the Commissioners of the Commonwealth of Massachusetts relating to the so-called western lands and dated December 16th, 1786, which Agreement is called in this case and generally known as the Treaty of Hartford and which is recorded in the office of the Secretary of the Commonwealth of Massachusetts, Volume 1, Treaties and Contracts, page 83 and is also duly recorded in the Office of the Secretary of State of the State of New York, in Liber 22 of Deeds at page 38, which Treaty of Hartford is referred to in said Bill of Complaint and in the said Answers thereto, the State of New York did not cede nor grant unto the Commonwealth of Massachusetts any of the land then under the water of Lake Ontario, and that the right of preemption of lands and territory granted to the Commonwealth of Massachusetts by the State of New York was not intended by the State of New York nor by the Commonwealth of Massachusetts to include any of the bed of Lake Ontario as it

then existed, and the Commonwealth of Massachusetts in and by the terms in said Treaty did thereby cede and release to the State of New York all right and title of said Commonwealth of Massachusetts in and to the bed of Lake Ontario as part of the rights appertaining to the sovereignty of the State of New York over the said territory.

Second: That the Commonwealth of Massachusetts in and by its Legislative Act approved November 21st, 1788 in Chapter 23 of the Laws and Resolutions of the Session of 1788-1789, did duly grant and convey to Oliver Phelps and Nathaniel Gorham the lands and premises which are known in this case and generally known as the Phelps and Gorham purchase, bounded by the north boundary line of the State of Pennsylvania, bounded on the east by the meridian line which formed the easterly boundary line of the land, the right of preemption to which was ceded to the Commonwealth of Massachusetts by the Treaty of Hartford; bounded on the west by a line which it was agreed and enacted as it approaches Lake Ontario running northwardly should be "12 miles distant from the most westward bounds of said Genesee River to the shore of Ontario Lake" and the north boundary of which, it was so agreed and enacted should run thence easterly along the shores of said Lake to the meridian forming said easterly boundary, and that it was the intention of the Commonwealth of Massachusetts and of said Oliver Phelps and Nathaniel Gorham; that in and by the said grant, there should be vested in said Oliver Phelps and Nathaniel Gorham title in and to all of the land between the northern boundary of Pennsylvania and the waters of Lake Ontario between the eastern and the western boundary lines of said grant, and that the expression used in said Legislative Act and grant "to the shore of Lake Ontario, thence eastwardly along the shores of said lake," was intended by the parties in said grant to mean to the edge of the water of Lake Ontario, and thence eastwardly along the water line of Lake Ontario, and that the Commonwealth of Massachusetts did not intend to and did not retain unto itself any land lying within said eastern and western boundaries of said Phelps and Gorham purchase bordering on waters of Lake Ontario and called the shore thereof, and that the Plaintiff, the Commonwealth of Massachusetts has no right, title and interest in or to any of the real estate or premises described in the Bill of Complaint.

Whereupon, it is now here ordered, adjudged, and decreed by this Court that the Bill of Complaint herein be, and the same hereby is, dismissed with costs to be paid by the Complainant.

It is further ordered by this Court that there be included as costs in this Court one-half of the cost of the typewritten copy of the testimony furnished to the Special Master, and the whole of the clerk's costs in this Court.

It is further ordered by this Court that there shall be paid by the Complainant to Wade H. Ellis, Esquire, Special Master appointed herein, the sum of Four Thousand Dollars ($4,000.00) as compensation for his services as such Special Master, together with the additional sum of Eight Hundred and Twenty-four Dollars and Twenty-eight Cents ($824.28), disbursements necessarily incurred by him as such Special Master.

FILED
OCT 5 1925
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 14, Original.—October Term, 1925.

Commonwealth of Massachusetts, Plaintiff,

vs.

The State of New York; The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe, State of New York; Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan as Commissioners of Appraisal; The New York Central Railroad Company; Ontario Beach Hotel & Amusement Company; Central Union Trust Company of New York; The Upton Company; Anna T. Granger; Emil Boshart; Rebecca Boshart; Bartholomay Brewing Company; Milton J. McIntyre; Belle McIntyre; Twentieth Ward Co-Operative Savings & Loan Association and The Farmers Loan & Trust Company, Defendants.

REPORT OF THE SPECIAL MASTER.

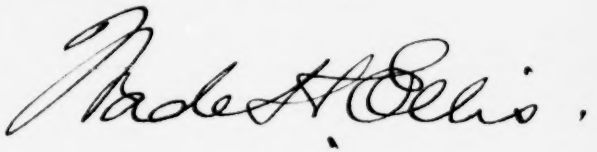
To the Honorable

The Supreme Court of the United States:

In the cause entitled The Commonwealth of Massachusetts *v.* The State of New York, et al., No. 20, Original, October Term, 1922, the defendants The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe in the State of New York; Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, as Commissioners of Appraisal; New York Central Railroad Company; Central Union Trust Company of New York; Ontario Beach Hotel & Amusement Company; Emil Boshart, Rebecca Boshart; Milton J. McIntyre, Belle McIntyre; Bartholomay Company, Inc.; and Twentieth Ward Co-operative Savings & Loan Association, having moved this Honorable Court to refer this cause to a Special Master to be designated and appointed "to take the proofs and make an advisory report to the Court upon the material allegations and questions of fact raised by the pleadings (with his opinion as to the law of the case) except as to the amount of damages to be paid for the property taken by the City of Rochester by eminent domain"; and

The motion having been granted on December 4, 1922, and thereafter on January 2, 1923, this Court having ordered "by agreement of counsel that Wade H. Ellis, Esq., be and he is hereby appointed Special Master to take proofs and make reports to the Court in this cause";

Now, pursuant to such order, having taken proofs in this case, I herewith submit my reports to the Court.



IN THE

SUPREME COURT OF THE UNITED STATES.

No. 14, Original.—October Term, 1925.

Commonwealth of Massachusetts, Plaintiff,

vs.

State of New York, et al., Defendants.

REPORT OF THE SPECIAL MASTER

STATEMENT

This is an action brought by the Commonwealth of Massachusetts against the State of New York, the City of Rochester, and various individuals and corporations, most of whom are citizens of New York, to establish title in the Commonwealth of Massachusetts to certain real property located within the city limits of the City of Rochester on the edge of Lake Ontario at the mouth of the Genesee River which the city has sought to condemn and use for park purposes. The bill in equity brought by the Commonwealth of Massachusetts alleges in substance that prior to December, 1786, the States of Massachusetts and New York claimed, under conflicting royal grants, a large area in what is now the western part of the State of New York, between the Canadian boundary on the north and the north line of the State of Pennsylvania on the south; that this controversy was settled by a treaty between the two states executed December 16, 1786, at Hartford, Connecticut, by commissioners appointed by both states; that by this treaty New York released, granted and confirmed to Massachusetts

the right of preemption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York had within a part of this territory (particularly described in the treaty and in the bill), covering roughly that part of New York State from the international boundary to the Pennsylvania line, west of the line running through Seneca Lake near the 77th degree of longitude, and including the premises in question on Lake Ontario at the mouth of the Genesee River and now part of the City of Rochester; that the Hartford treaty conveyed to Massachusetts all the uplands and lands under water within the boundaries described therein, including title to land under the waters of Lake Ontario. The bill describes the particular land claimed as follows: "Situated in the City of Rochester, County of Monroe and State of New York, bounded and described as follows: Beginning at a point in the north line of Beach Avenue and where the said north line intersects the west line of the west United States Government Pier; thence (1) westerly along the north line of Beach Avenue about one thousand six hundred eighty-five and five-tenths (1,685.5) feet to a point; thence (2) northerly along the west line of lands formerly occupied by the Bartholomay Brewing Company, about three hundred and eighteen (318) feet to low water mark of Lake Ontario; thence (3) easterly along said low water mark of Lake Ontario about one thousand seven hundred and forty-five (1,745) feet to the west line of the said United States Government Pier; thence (4) southerly along the west line of said Pier about six hundred and forty-two (642) feet to the place of beginning."

The bill further alleges that Massachusetts has never divested herself of the parcel described, and is the owner and in possession of said parcel; that the City of Rochester by certain eminent domain proceedings more fully described in the bill, and the individual defendants by certain record conveyances have created divers clouds upon

the plaintiff's title, and the bill prays that the title of Massachusetts be established and the several clouds removed. The bill also prays that the eminent domain proceedings be stayed and on final hearing permanently enjoined, or that, in the alternative, the court determine the right of Massachusetts to compensation for said lands, and the amount thereof. The matters raised by these latter prayers, however, are not involved in the present proceedings referred to the Special Master.

By amendment to the bill, the plaintiff struck out the name of one of the defendants, Anna T. Granger, who died before service was made, and substituted John Albert Granger and Emma R. Granger of Illinois, and Gideon Granger of New York; the said John Albert Granger and Emma R. Granger being the only individual defendants who are not citizens of New York.

All the defendants except the Grangers and the Farmers Loan and Trust Company have answered denying the plaintiff's title. The Farmers Loan and Trust Company, named as defendant in the bill by reason of holding a mortgage on part of the parcel in question, released its lien and is not an interested party. The Grangers filed a motion to dismiss which the Court overruled, and they have not elected to file any further pleadings. Since the filing of the bill, the Upton Company, one of the defendants, filed a deed of quit claim to the Ontario Beach Hotel & Amusement Company, another of the defendants, and now has no interest in the litigation.

During the course of the proceedings before the Special Master on October 15, 1923, William G. Hoag, representing himself as President of the Seneca Nation, and Walter Kennedy, as Clerk of the Seneca Nation, presented in person a communication addressed to the Special Master in which counsel of the Seneca Nation stated that, having learned that certain lands under the waters of Lake Ontario near the mouth of the Genesee River, had been filled

in articifially and appropriated by private interests, and the ownership of such lands was the subject of dispute in the Supreme Court of the United States in a proceeding to which the Seneca Nation was not a party, they gave notice that all such lands so made are within the domain of the Seneca Nation which has never made any cession thereof, nor authorized such reclamation, and they protest against proceedings in respect to the title of such lands taken without the consent of the Seneca Nation, and call upon the Supreme Court to protect the Seneca Nation in its right and interest under the pledge of the Treaties of Fort Stanwix, Fort Harmer and Canadaigua, and they ask that this notice be placed on the records in this case. The notice was read at the hearing and is found at pages 295 and 296 of the typewritten transcript of record. No further action was taken upon the notice.

Evidence both documentary and oral was introduced on behalf of the plaintiff and of the defendants at various hearings in Rochester, N. Y., and Boston, Mass. Hearings were held at Rochester, September 24, 25 and 26, 1923; October 15, 16 and 17, 1923; December 10, 11 and 12, 1923, and at Boston, March 24, 1924. By request of counsel for both plaintiff and defendants, briefs for both sides were received and on March 5, 6 and 7, 1925, oral arguments of counsel were heard. These arguments were transcribed and delivered to the Special Master, March 30, 1925.

The documentary evidence consisted principally of various treaties, contracts and conveyances under which the parties claim in the chain of title. These included the Treaty of Hartford, of December 16, 1786, by which the Commonwealth of Massachusetts and the State of New York settled the disputes between them relating to certain so-called "western lands", now in the western part of New York; various conveyances by Massachusetts of portions of the territory so received from New York, including a conveyance to Phelps and Gorham of that part of the territory in which the City of Rochester lies, and various

acts and resolves of the legislature of Massachusetts with reference to conveyances of parts of the lands received from New York, and with reference to the jurisdiction over shores and lakes and the statute of limitations of Massachusetts. There were also introduced certain surveys of part of the property conveyed to Phelps and Gorham, made in 1803, and field notes and maps made in 1810, and subsequently recorded in the office of the County Clerk of Monroe County and many maps, charts and photographs of the region, including charts based on United States Government records as to the level of water in Lake Ontario covering a period of a hundred years, as well as charts based on data obtained in test pits dug at various places in the locus in dispute.

By stipulation of the parties it was agreed that the Treaty of Hartford was duly entered into, and was recorded in the office of the Secretary of State of New York in 1787, and in the Ontario County Deed Record on January 3, 1835, and that a duplicate original is on file in the office of the Secretary of State in Massachusetts; that a certain deed from the Five Nations to Nathaniel Gorham and Oliver Phelps executed July 8, 1788, was recorded in the office of the Secretary of State of Massachusetts; that the Massachusetts Resolves, 1787, approved April 1, 1788, and Massachusetts Acts 1788, (Chapter 23, page 35) approved November 1, 1788, being an agreement of the Commonwealth of Massachusetts to convey, and the conveyance to Phelps and Gorham of the tract described therein were duly recorded in the office of the Secretary of State of New York, and with the Ontario County Deed Records; that a certain survey made by William Shepard of a portion of the Phelps and Gorham purchase, and the ranges and townships including township 2, short range, west of the Genesee River, was deposited, with the original field notes in the Pulteney Land office at Bath, New York, and a volume including copies of Shepard's field notes embracing a survey of the village of Charlotte, now the 23rd Ward of

the City of Rochester, including lots 20 and 21, township 2, short range, west of the Genesee River, and containing also David Finley's Field Notes, of sundry lots in the village of Charlotte made in 1810, and copied by C. B. Parsons, together with a map made by David Finley, was duly placed on record subsequent to September 14, 1878, in the office of the County Clerk of Monroe County. The stipulation further sets forth in detail the chain of title by which each of the individual or corporate defendants claimed the lands respectively through mesne conveyances from Phelps and Gorham, and it was agreed in the stipulation that the grantors in all the deeds forming the chains of title, conveyed to the grantees all the right, title and interest of the grantors in law or in equity in the premises described thereby, and the appurtenances thereto and in the premises in dispute and described in the bill of complaint, and that all said deeds (except the deed of the Five Nations to Phelps and Gorham) were duly recorded in the State of New York. It was further stipulated that town lots 20 and 21 mentioned in the bill were originally in Ontario County and were included in the part of Genesee County that was afterwards set off from Ontario County and are now in that part of Monroe County which was afterwards set off from Genesee County, and are located in the 23rd Ward of the City of Rochester, formerly the Village of Charlotte. The various parcels of land conveyed to the respective defendants were shown on a map accompanying the stipulation.

The evidence given orally consisted of the testimony of several officials of the State of Massachusetts, including Governor Cox, as to the authority to bring the action, and the manner in which the physical situation, the acts of the defendants and the claim of Massachusetts were brought to the attention of the officials of that State; of numerous witnesses with reference to the different stages of the waters of Lake Ontario since the Treaty of Hartford, in explanation of various records on that subject and other-

wise, and with reference to the manner in which the land in question was formed, whether by natural accretion or artificial fill. All exhibits and testimony deemed by any of the parties material to the issues and offered in evidence were received, some over objection, but no evidence offered was excluded.

The contention of the Commonwealth of Massachusetts is, that, as to the part of the Hartford Treaty lands which is in and around the City of Rochester and includes the parcel in dispute, the proprietary interest and ownership of the land under the waters of Lake Ontario and the shore of Lake Ontario below high water mark, were conveyed to Massachusetts by the Treaty of Hartford and that Massachusetts did not divest herself of this property by the conveyance to Phelps and Gorham (known as the Phelps and Gorham purchase) or in any other way, and that therefore the land in dispute belongs to Massachusetts because it is either land added to the shore by natural accretion and so belongs to the owner of the shore or it is land made by artificial fill on the bed of the lake and so belongs to the owner of the bed of the lake.

The State of New York and other defendants whose claims are adverse to that of Massachusetts contend (1) that the Treaty of Hartford did not convey to Massachusetts any proprietary right in the bed of Lake Ontario; (2) that the conveyance by Massachusetts to Phelps and Gorham, interpreted according to the intent of the parties, conveyed to Phelps and Gorham whatever right Massachusetts had in the land to the water's edge; and that the land in dispute in the City of Rochester was formed by natural accretion, and became the property of the owners of the land abutting on the shore, but that even if formed by artificial fill on the bed of the Lake, it was not a fill on the property of Massachusetts; and (3) that Massachusetts lost by acquiescence and lapse of time any right or title to the premises in dispute.

FINDINGS OF FACT

I.

THE TREATY BETWEEN NEW YORK AND MASSACHUSETTS

Prior to the Revolution a long-standing dispute existed between the Commonwealth of Massachusetts and the State of New York over the right to an extensive territory comprising a large part of New York, and including the present western portion of that State. Commissioners were appointed by the two States to settle this controversy. These commissioners met at Hartford, Connecticut, and on December 16, 1786, executed a treaty known as the Treaty of Hartford. The treaty was duly approved; recorded in the office of the Secretary of the Commonwealth of Massachusetts; recorded in the office of the Secretary of State of New York in 1787 (deeds liber 22, page 38), and with the deed records of the county in which the tract in the City of Rochester, in controversy in this case, is located (the premises in dispute being in that part of Monroe County which was subsequently set off from Genesee County, which was in turn set off from Ontario County, New York; the record having been made in the deed records of Ontario County).

The treaty consists of a preamble and eleven articles. The preamble describes the controversy and the claims of the respective States, Massachusetts claiming as its "just and proper right" a certain large territory, and New York claiming "as well in respect of property as jurisdiction" certain lands in conflict with the claim of Massachusetts; the unsuccessful attempt to have the controversy determined by a court constituted by Congress under the 9th Article of Confederation; the petition presented by the Commonwealth of Massachusetts to Congress for that purpose, and finally, the grant of authority by each State to its commissioners to settle the matter by agreement. The first two articles read as follows:

> "First, the Commonwealth of Massachusetts doth hereby cede, grant, release and confirm to the State of

New York forever all the claim, right and title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction of the Lands and Territories so claimed by the State of New York as hereinbefore stated and particularly specified. SECONDLY, the State of New York doth hereby cede, grant, release and confirm to the Commonwealth of Massachusetts and to the use of the Commonwealth, their Grantees and the heirs and Assigns of such Grantees forever, the Right of pre-emption of the Soil from the native Indians and all other the Estate, Right, Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted) which the State of New York hath of in or to Two hundred and thirty thousand and four hundred Acres to be located by the Commonwealth of Massachusetts and to be situate to the northward of and adjoining to the Lands granted respectively to Daniel Cox and Robert Lettice Hooper and their respective Associates and between the Rivers Owega and Chenango. AND ALSO of in or to all the Lands and Territories within the following Limits and Bounds that is to say, BEGINNING in the north boundary Line of the State of Pennsylvania in the parallel of forty-two degrees of north Latitude at a point distant eighty-two miles west from the north east Corner of the state of Pennsylvania on Delaware River as the said boundary Line hath been run and marked by the Commissioners appointed by the States of Pennsylvania and New York respectively and from the said Point or Place of beginning running on a due meridian north to the boundary Line between the United States of America and the king of Great Britain thence westerly and southerly along the said boundary Line to a meridian which will pass one mile due East from the northern Termination of the Streight or waters between Lake Ontario and Lake Erie thence South along the said Meridian to the South Shore of Lake Ontario thence on the eastern side of

> the said Streight by a Line always one mile distant from and parallel to the said Streight to Lake Erie thence due west to the boundary Line between the United States and the king of Great Britain thence along the said boundary Line until it meets with the Line of Cession from the State of New York to the United States thence along the said Line of Cession to the northwest corner of the State of Pennsylvania and thence East along the northern boundary Line of the State of Pennsylvania to the said place of beginning, and which said Lands and Territories so ceded, granted and released and confirmed are parcel of the Lands and Territories described in the said petition."

Article 3 conveys and releases to New York "the right of preemption of the Soil from the native Indians and all other the Estate, Right, title and Property" which the Commonwealth had in the residue of the lands claimed by New York and described in the instrument. Article 4 exempts from all taxes whatsoever the land released to Massachusetts so long as the same remained the property of the Commonwealth. Article 5 provides that no rents or services shall be reserved in any grant of said lands by the Commonwealth. Article 6 reserves equal rights of navigation and fishery with citizens of New York on and in Lake Ontario and Lake Erie and the waters communicating, and respecting the roads and portages between the lakes. Article 7 provides that "no adverse possession of the said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts." Article 8 provides that so long as any part of said land shall remain the property of Massachusetts, New York shall not "cede, relinquish or in any manner divest themselves of the government and jurisdiction of the said lands . . . without the consent of the Commonwealth of Massachusetts." Article 9 provides that Massachusetts and persons by it authorized may from time to time hold treaties with the Indians in regard to the right of soil, with such armed forces

as they shall deem necessary for that purpose. Article 10 provides that Massachusetts may grant the right of preemption of the whole or any part of the lands and territories to any persons who shall have good right to extinguish the claims of the native Indians by purchase, provided that no purchase shall be valid unless made in the presence of the Superintendent appointed by Massachusetts, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts. Article 11 requires that the grantees of the lands and territories under Massachusetts shall cause copies of their grants or confirmations, certified under the seal of the Commonwealth to be deposited for record without fee in the office of the Secretary of State of New York within six months after the confirmation thereof and that every grant or confirmation which shall not be deposited shall be adjudged void.

The locus in dispute in this case is within the bounds of the territory described in Article 2 as beginning on the Pennsylvania line and running "on a due meridian north to the boundary line between the United States of America and the King of Great Britain, thence westerly and southerly along the said boundary line to a meridian which will pass one mile due east from the northern termination of the streight or waters between Lake Ontario and Lake Erie; thence south along the said meridian to the south shore of Lake Ontario, thence on the eastern side of said Streight," etc., and thence by divers courses to the Pennsylvania boundary line and the place of beginning.

The Treaty of Hartford is set out in full in the marginal note hereto, and there is attached for convenient reference, an outline sketch of the territory included in the Treaty, showing the approximate boundaries of subsequent conveyances by Massachusetts.*

*(Agreement between the Commissioners of State of New York & this State relating to the Western Lands 16th December 1786).

TO ALL TO WHOM THESE PRESENTS SHALL COME The underwritten John Lowell, James Sullivan, Theophilus Parsons, and Rufus King, Agents or

Commissioners appointed by the Commonwealth of Massachusetts of the one part and the underwritten James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith, and Egbert Benson six of the Agents or Commissioners appointed by the State of New York of the other part, SEND GREETING whereas the Commonwealth of Massuchusetts did heretofore present a petition to the United States in Congress assembled thereby among other things stating That all that Territoy which in the said petition is described as "All that part of New England in America which lieth and extendeth between a great River called Merrimac and a certain other River there called Charles River being the bottom of a bay there called Massachusetts-Bay and also all those lands lying within three english miles to the southward of the southermost part of the said Bay and extending thence northward in latitude to the northward of every part of the said River Merrimac and in breadth of latitude aforesaid extending throughout all the main land in longitude westwardly to the Southern Ocean." Was the just and proper Right of the said Commonwealth and farther stating that the State of New York had set up a claim to some part of the Land before mentioned the said Commonwealth did therefore by the said petition solemnly request of the United States in Congress that Commissioners might be appointed for enquiring into and determining upon the claim aforesaid of the Legislature of the said Commonwealth and that such other proceedings respecting the premises might be had as are by the foederal government of the said United States in such case made and provided as by the said petition filed among the Archives of the United States reference being thereunto had may more fully appear, AND WHEREAS the State of Newyork doth in opposition to the said claim of the Commonwealth of Massachusetts claim as the just and proper right of the said State as well in respect of property as jurisdiction all those Lands and Territories bounded on the north by the parallel of latitude passing through the said point place or boundary aforesaid of three miles to the northward of every part of the said River Merrimac and bounded on the South by the parallel of Latitude passing through the said point or place situate three miles south of the Southermost part of the said Bay called Massachusetts Bay bounded on the west by the Limits between the United States and the king of great britain and the line of cession from the State of New York to the United States and bounded on the East by the Line agreed on and established between the late Colony of the Massachusetts Bay and the late Colony of New York in the year one thousand seven hundred and seventy three and from the northern termination of the said Line then bounded on the East by the west bank of Connecticut River AND WHEREAS the State of New York having been duly notified did appear by their lawful agents to vindicate such their said right against the said claim of the said Commonwealth and proceedings were thereupon had in Congress pursuant to the articles of confideration in order to the appointment of Commissioners or Judge to constitute a Court for hearing and determining the said matters in question AND WHEREAS the said John Lowell, James Sullivan, Theophilus Parsons and Rufus King were afterwards by a certain Commission under the seal of the said Commonwealth and bearing date the twenty sixth day of april in the ninth year of the independence of the

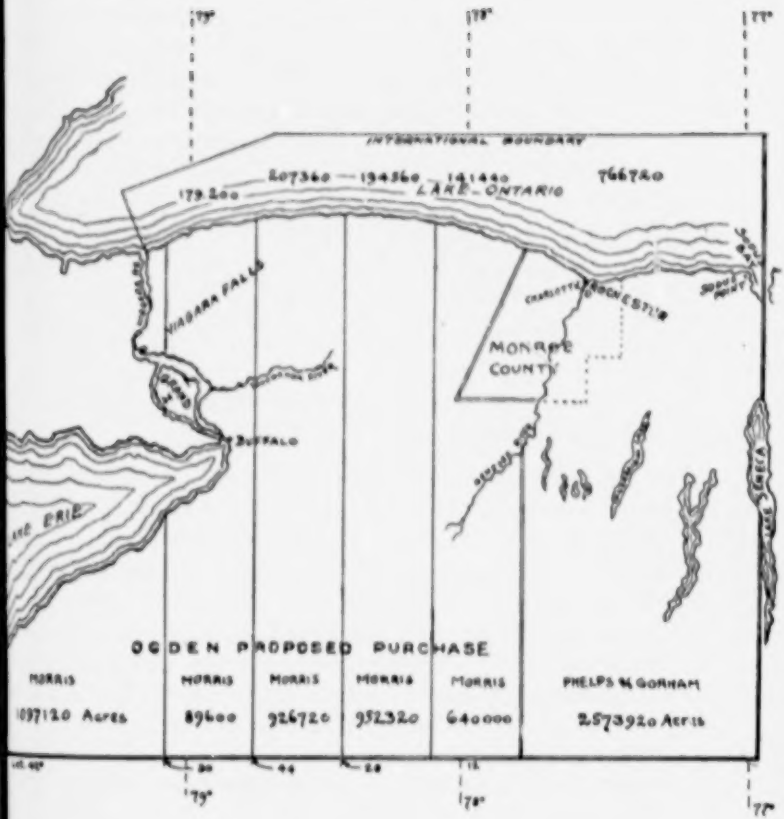
United States and made in pursuance of an Act of the Legislature of the said Commonwealth passed the fourteenth day of march in the eighth year of the independence of the United States and of a resolution of the said Legislature passed the eighteenth day of the said month of march commissionated to the Agents to manage conduct and prosecute the claims of the said Commonwealth to the Lands described in the said petition. AND WHEREAS afterwards and pending such proceedings in Congress the Legislature of the Commonwealth of Massachusetts did by an act entitled "An Act impowering the Agents appointed by this Government to defend the Territory on the west side of Hudsons River against the claims of the State of New York to settle the controversy relative thereto otherwise than by a foederal Court if they shall judge it expedient." Enact that the major part of the said Agents or Commissioners should be fully authorized and impowered to agree with the Agents or Commissioners of the State of New York and settle the controversy respecting the Territory aforesaid by a foederal Court as appointed by virtue of the Confideration or otherwise in such way and manner as they should judge would comport with justice and the interest of the said Commonwealth, And the Legislature of the State of New York did by an Act entitled "An act supplementary to the act entitled an act to appoint Agents or Commissioners for vindicating the right and jurisdiction of this State against the claims of the Commonwealth of Massachusetts pursuant to the Articles of Confideration and perpetual union of the United States." Among other things enact that it should be lawful for the said James Duane Robert R. Livingston Egbert Benson John Haring Melancton Smith & Robert Yates and also John Lansing junior or any five or more of them to settle the said controversy between the said State of New York and the said Commonwealth of Massachusetts otherwise than by the said foederal Court in such manner as they should judge most condusive to the interest of the said State as by the said Commission and the said several Acts relation being thereunto had may appear NOW THEREFORE KNOW YE that the underwritten Commissioners on the part of the Commonwealth of Massachusetts and the State of New York respectively having by mutual consent assembled at the City of Hartford in the State of Connecticut on the thirtieth day of november last in order to the due execution of their respective Trusts, and having duly exchanged and considered their respective powers and declared the same legal and sufficient after several conferences and to the End that all interfering Claims and Controversies between the said Commonwealth of Massachusetts and the said State of New York as well in respect of Jurisdiction as Property may be finally settled and extinguished and peace and harmony for ever established between them on the most solid foundation HAVE agreed and by these presents DO mutually for and in behalf of the said Commonwealth of Massachusetts and the said State of New York by whom respectively they the said Commissioners have been so appointed and authorized as aforesaid agree to the mutual cessions Grants Releases and other Provisions following that is to say FIRST the Commonwealth of Massachusetts doth hereby cede grant release and confirm to the State of New York for ever all the claim right and Title which the Commonwealth of Massachusetts hath to the Government Sovereignty and Jurisdiction of the Lands and Territories so claimed by the State of New York as herein before stated and particularly

specified SECONDLY the State of New York doth hereby cede grant release and confirm to the Commonwealth of Massachusetts and to the use of the Commonwealth their Grantees and the heirs and Assigns of such Grantee for ever the Right of pre-emption of the Soil from the native Indians and all other the Estate Right Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted) which the State of New York hath of in or to Two hundred and thirty thousand and four hundred Acres to be located by the Commonwealth of Massachusetts and to be situate to the northward of and adjoining to the Lands granted respectively to Daniel Cox and Robert Lettice Hooper and their respective Associates and between the Rivers Owega and Chenango. AND ALSO of in or to all the Lands and Territories within the following Limits and Bounds that is to say BEGINNING in the north boundary Line of the State of Pennsylvania in the parallel of forty two degrees of north Latitude at a point distant eighty two miles west from the north east Corner of the State of Pennsylvania on Delaware River as the said boundary Line hath been run and marked by the Commissioners appointed by the States of Pennsylvania and New York respectively and from the said Point or Place of beginning running on a due meridian north to the boundary Line between the United States of America and the king of Great Britain thence westerly and southerly along the said boundary Line to a meridian which will pass one mile due East from the northern Termination of the Streight or waters between Lake Ontario and Lake Erie thence South along the said Meridian to the South Shore of Lake Ontario THENCE on the eastern side of the said Streight by a Line always one mile distant from and parallel to the said Streight to Lake Erie thence due west to the boundary Line between the United States and the king of Great Britain thence along the said boundary Line until it meets with the Line of Cession from the State of New York to the United States thence along the said Line of Cession to the north west Corner of the State of Pennsylvania and thence east along the northern boundary Line of the State of Pennsylvania to the said place of beginning, and which said Lands and Territories so ceded granted and released and confirmed are parcel of the Lands and Territories described in the said petition THIRDLY the Commonwealth of Massachusetts doth hereby cede grant release and confirm to the State of New York and to the use of the State of New York their Grantees and the heirs and assigns of such Grantees for ever the right of pre-emption of the Soil from the native Indians and all other the Estate Right title and Property which the Commonwealth of Massachusetts hath of in or to the Residue of the Lands and Territories so claimed by the State of New York as herein before stated and particularly specified FOURTHLY that the Lands so ceded granted released and confirmed to the Commonwealth of Massachusetts or such part thereof as shall from time to time be and remain the property of the Commonwealth of Massachusetts shall during the Time that the same shall so be and remain such property be free and exempt from all Taxes whatsoever and that no general or State Tax shall be charged on or collected from the Lands hereafter to be granted by the Commonwealth of Massachusetts or on the Occupants or Proprietors of such Lands until fifteen years after such Confirmation as is herein after mentioned of such Grant shall have expired but that the Lands so to be granted and the Occupants thereof shall during the

said period be subject to Town or County charges or Taxes only Provided that this Exemption from general or state Taxes shall not be construed to extend to such duties Excises or Imposts to which the other Inhabitants of the State of New York shall be subject and liable FIFTHLY That no Rents or Services shall be reserved in any Grants to be made of the said Lands by the Commonwealth of Massachusetts SIXTHLY That the Inhabitants on the said Lands and Territories being Citizens of any of the United States holding by Grants from the Commonwealth of Massachusetts shall be entitled to equal Rights with the other Citizens of the State of New York, And farther that the Citizens of the Commonwealth of Massachusetts shall from time to time and at all times hereafter have and enjoy the same and equal Rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie and the Waters communicating from the one to the other of the said Lakes and respecting the Roads and Portages between the said Lakes as shall from time to time be had and enjoyed by the Citizens of the State of New York and the Citizens of the Commonwealth of Massachusetts shall not be subject to any other Regulations or greater Tolls or Duties to be made or imposed from time to time by the State of New York respecting the premises than the Citizens of the State of New York shall be subject to SEVENTHLY That no adverse possession of the said Lands for any length of time shall be adjudged a Disseizin of the Commonwealth of Massachusetts EIGHTHLY that the State of New York so long as any part of the said Lands shall be and remain the property of the Commonwealth of Massachusetts shall not cede relinquish or in any manner divest themselves of the Government and Jurisdiction of the said Lands or any part thereof without the Consent of the Commonwealth of Massachusetst NINTHLY That the Commonwealth of Massachusetts may from time to time by Persons to be by them authorized for the purpose hold Treaties and Conferences with the native Indians relative to the property or right of soil of the said Lands and Territories hereby ceded granted released and confirmed to the Commonwealth of Massachusetts and with such armed Force as they shall deem necessary for the more effectual holding such Treaty or Conference and the Commonwealth of Massachusetts within Six months after such Treaties shall respectively be made shall cause Copies thereof to be deposited in the office of the Secretary of the State of New York TENTHLY The Commonwealth of Massachusetts may grant the Right of pre-emption of the whole or of any part of the said Lands and Territories to any person or persons who by virtue of such Grant shall have good right to extinguish by purchace the claims of the native Indians provided however that no purchace from the native Indians by any such Grantee or Grantees shall be valid unless the same shall be made in the presence of and approved by a Superintendent to be appointed for such purpose by the Commonwealth of Massachusetts and having no interest in such purchace and unless such purchace shall be confirmed by the Commonwealth of Massachusetts ELEVENTHLY That the Grantees of the said Lands and Territories under the Commonwealth of Massachusetts shall within Six months after the Confirmation of their respective Grants cause such Grants or the Confirmations thereof or copies of such Grants or Confirmations certified or exemplified under the Seal of the Commonwealth of Massachusetts to be deposited in the said office of the

Secretary of the State of New York to the End that the same may be recorded there and after the same shall have been so recorded the Grantees shall be entitled to receive again from the said Secretary their respective Grants or Confirmations or the Copies thereof whichsoever may have been so deposited without any charges or fees of office whatsoever and every Grant or Confirmation which shall not or of which shall not be so deposited shall be adjudged void IN TESTIMONY whereof the said John Lowell James Sullivan Theophilus Parsons and Rufus King for and in the name and behalf of the said Commonwealth of Massachusetts and the said James Duane Robert R. Livingston Robert Yates John Haring Melancton Smith and Egbert Benson for and in the name and on behalf of the said State of New York have to these presents and a Duplicate thereof both Indented interchangeably set their Hands and affixed their Seals. Done at the City of Hartford aforesaid the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty six and the Eleventh year of the Independence of the United States of America.

Witnesses present the sealing and delivery	John Lowell	(Seal)	Jas. Duane	(Seal)
	James Sullivan	(Seal)	Robt. R. Livingston	(Seal)
	Theop Parsons	(Seal)	Robert Yates	(Seal)
	Rufus King	(Seal)		
George Wyllys	Simeon DeWitt		John Haring	(Seal)
Thos. Seymour	Lewis Duboys		Melancton Smith	(Seal)
Jesse Root	Nathl. Bethune		Egbt. Benson	(Seal)
Jere Wadsworth				
E. D. Humphreys				
Wm. Imlay				
Joseph Webb				


INTERNATIONAL BOUNDARY
207360
194360
141440
766720
179200
LAKE ONTARIO
NIAGARA FALLS
MONROE COUNTY
BUFFALO
LAKE ERIE
LAKE SENECA
OGDEN PROPOSED PURCHASE
MORRIS
1097120 Acres
MORRIS
89600
MORRIS
926720
MORRIS
952320
MORRIS
640000
PHELPS & GORHAM
2573920 Acres
79°
78°
77°

II.

THE MASSACHUSETTS GRANT TO PHELPS AND GORHAM

(a) In 1788, the Commonwealth of Massachusetts by resolve of its Legislature, in view of the provisions of Article 10 of the Treaty of Hartford, providing that Massachusetts might grant, as to any of the territory received from New York, the right of preemption to any person or persons, agreed to convey to Nathaniel Gorham and Oliver Phelps the entire right, title and demand which the Commonwealth had to the whole "western territory" ceded to it by the State of New York. This was done by resolve (Res. 1787, c. 135, p. 900) approved April 1, 1788, duly recorded together with an act approved November 21, 1788, as one instrument, in the office of the Secretary of State of New York, and with the Ontario County deed records (liber 272, page 392). This resolve, omitting the title, reads as follows:

> COMMONWEALTH OF MASSACHUSETTS, In the House of Representatives, March 31st, 1788.
>
> On the proposal made to the General Court by the honorable NATHANIEL GORHAM and OLIVER PHELPS, Esquires to purchase for the consideration of THREE HUNDRED THOUSAND POUNDS in consolidated securities of this Commonwealth, or TWO THOUSAND POUNDS SPECIE together with two hundred and ninety thousand pounds in like securities, the right of pre-emption which this Commonwealth has in and to the Western Territory, so called, lately ceded by the State of New York to this Commonwealth as appears by deed executed by their respective Commissioners at Hartford the 16th day of December, A. D. 1786.
>
> RESOLVED, that the said proposal for purchasing the Land aforesaid for the consideration of three hundred thousand pounds in consolidated securities of this Commonwealth be and hereby is accepted.

And this Commonwealth doth hereby agree to grant, sell and convey to the said Nathaniel Gorham and Oliver Phelps, Esquires, all the Right, Title and Demand which the said Commonwealth has in and to the said Western Territory by the Deed of Cession aforesaid. To have and to hold the same to the said Nathanial Gorham & Oliver Phelps Esquires, their heirs and assigns forever upon the Condition hereafter expressed; and the said Nathaniel Gorham and Oliver Phelps are hereby authorized to extinguish by purchase the Claims of the Native Indians holding the fee or right of Soil in the Territory aforesaid. And it is hereby

RESOLVED that the Reverend Mr. Samuel Kirkland be and hereby is appointed to superintend and approve at the Expence of the said Grantees the purchase which the said Nathaniel Gorham and Oliver Phelps Esquires shall make of the Claims of such Native Indians. And it is hereby further

RESOLVED that all such purchases as the said Nathaniel Gorham and Oliver Phelps shall make of the Claims of the said Indians in presence of the said Superintendant shall be confirmed by this Commonwealth, provided the said Gorham and Phelps shall give security to the Satisfaction of the Supreme Executive of this Commonwealth seperate obligations to pay the aforesaid consideration monies to the Treasurer of this Commonwealth, or his successor in office for the use of this Commonwealth, one third thereof in one year, one other third thereof in two years and one other third thereof in three years from the date of this Resolve with interest in like consolidated securities to commence from the date of this Resolve until paid.

(b) Following this resolve, and on April 23, 1788, about three weeks later, the governor of Massachusetts executed a certificate as follows:

COMMONWEALTH OF MASSACHUSETTS

By His Excellency, JOHN HANCOCK, Esq, Governor of the Commonwealth of Massachusetts.

John Hancock

I do certify all whom it may concern, that the Government of this Commonwealth have granted & conveyed to the Honorable Nathaniel Gorham, Esqr. & to the Honorable Oliver Phelps, Esqr. all their right, & title which this Government hath or ought to have to the lands lying west of Hudson's River in the State of New York. And the said Nathaniel Gorham and Oliver Phelps, Esqrs, are authorized to extinguish by purchase the claims of our good Friends & Brethren the native Indians holding the fee or right of Soil in the Territory aforesaid, And WE have appointed our good Friend the Rev. Mr. Samuel Kirkland to superintend & approve the purchase that they shall make of the claims of such native Indians & that all such purchases as the said Nathaniel Gorham & Oliver Phelps Esqrs. shall make of the claims of our said good friends of the Six Nations in presence of the said Superintendent shall be confirmed by the said Government of this Commonwealth.

IN TESTIMONY whereof I have caused the Public Seal of the Commonwealth aforesaid to be hereto affixed this twenty-third day of April A. D. 1788. And in the Twelfth year of the Independence of the United States of America.

By His Excellency's Command
John Avery Jun, Secretary.

This certificate was not recorded in the office of the Secretary of State of New York, but was recorded with the "miscellaneous records" of Ontario County in 1816.

(c) On July 8, 1788, Phelps and Gorham procured from the Five Nations (Mohawks, Oneidas, Onandagas, Cayugas

and Senecas) in the presence and with the approval of Superintendent Kirkland, the superintendent appointed by Massachusetts, a deed or treaty extinguishing the Indian claim to the territory therein described, which was part only of the territory ceded to Massachusetts by New York, and which Massachusetts had agreed to convey to Phelps and Gorham. The property stated in the deed to be "given, granted, ceded, bargained, sold, aliened, conveyed and confirmed" to Oliver Phelps and Nathaniel Gorham and to their heirs and assigns forever, was described as

"All that territory or Country of land lying within the State of New York contained within & being parcel of the lands and territory, the right of preemption of the soil whereof from the native Indians was ceded by the State of New York aforesaid to the Commonwealth aforesaid by Deed of Cession executed at Hartford by Commissioners for that purpose on the sixteenth day of September in the year of Our LORD One thousand seven hudred and eighty six within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of Pennsylvania in the parallel of forty-two degrees north latitude at a point distant eighty-two miles west from the northeast corner of Pennsylvania on Delaware river as the said boundary line hath been run and marked by the Commissioners, appointed by the States of New York & Pennsylvania respectively, and from said point or place of beginning, running west upon said line to a meridian which will pass through that corner or point of land made by the confluence of the Thanahasgwaikon Creek, so called with the waters of the Genesee river thence running north along the said meridian to the corner or point last mentioned thence northwardly along the waters of the said Genesee river, to a point two miles north of Thanawageras village, so called, thence running in a direction due west twelve miles, thence running in a direction northwardly, so as to be

twelve miles distant from the most westward bends of said Genesee river to the shore of the Ontario Lake thence eastwardly along the shores of said Lake to a meridian which will pass through the first point or place of beginning above mentioned, thence south, along said meridian to the first point or place of beginning aforesaid, together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory, to have and to hold, the above granted and bargained premises, together with all the appurtenances and privileges thereunto belonging or in any wise appertaining."

The description by metes and bounds in this Indian deed embraces something like one-third of the territory included in the Hartford Treaty Cession, being the eastern third. The southern boundary is identical with the southern boundary in the Hartford Treaty Cession except that it is about 44 miles along the Pennsylvania north line (beginning at the Treaty corner) instead of 140 odd miles to the western limits of New York, as in the Hartford Treaty Cession. The eastern boundary follows the line of the eastern boundary in the Hartford Treaty Cession except that the Hartfort Treaty line runs north from the Pennsylvania line to the international boundary line in the middle of Lake Ontario, whereas in the Indian deed the eastern boundary runs south from the shore of Lake Ontario to the Pennsylvania line; the northern boundary runs "along the shores" of Lake Ontario, whereas the northern boundary of the Hartford Treaty Cession runs along the international boundary in the middle of Lake Ontario. The western boundary runs by various courses northerly from the Pennsylvania line (at a point about 44 miles west of the intersection of the eastern boundary line) to the shore of Lake Ontario, whereas the Hartford Treaty western boundary runs by various courses southerly from the international boundary;

and there is a clause not found in the Hartford Treaty, "together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory."

The Indian deed was recorded in Massachusetts, but it is not shown that it was recorded in the office of the Secretary of State of New York.

(d) In November, 1788, the Commonwealth of Massachusetts by Statute, 1788, chapter 23, approved November 21, 1788, granted and confirmed to Phelps and Gorham that part of the whole territory ceded by New York, to which Phelps and Gorham had obtained a release from the native Indians. The text of this resolve of the Legislature of Massachusetts is as follows:

> AN ACT for confirming to Nathaniel Gorham & Oliver Phelps Esquires, a certain Tract of Land pursuant to a Contract made with them for that purpose.
>
> WHEREAS the Legislature of this Commonwealth by their resolve of the first of April last, did agree to grant, sell and convey to the said Nathaniel Gorham and Oliver Phelps all the right, Title and demand which the said Commonwealth has in and unto the said Lands ceded by the State of New York, to the said Commonwealth by Deed executed by their respective Commissioners, at Hartford, the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty-six, upon the Conditions in the said Resolve expressed.
>
> And WHEREAS the said Nathaniel Gorham & Oliver Phelps have on their part performed said Agreement & complied with the conditions of the said Resolve,
>
> And WHEREAS the said Nathaniel Gorham & Oliver Phelps by virtue of authority derived from the aforesaid Resolve, have by deed, from the Sachems

Chiefs and Warriors of the five Nations of Indians bearing date the eighth day of July last, purchased the claims of the Native Indians to the Fee or Right of Soil, in part only of the said Lands as contained within the descriptions of the said Deed hereafter inserted which purchase appears to have been made under the Superintendence prescribed and in the manner intended by the aforesaid Resolve.

BE IT THEREFORE ENACTED by the Senate & House of Representatives in General Court Assembled & by the authority of the same, that there be and hereby is granted & confirmed unto Nathaniel Gorham of Charles Town in the County of Middlesex Esquire and Oliver Phelps of Granville, in the County of Hampshire Esquire, their heirs and Assigns, All the Right, title, Claim and Demand which this Commonwealth has in and to the following Tract of Land to wit. Beginning on the North Boundary Line of the State of Pennsylvania in the parrallel of forty-two degrees north latitude at a point distant eighty-two miles west from the north east corner of Pennsylvania, on Deleware River as the said Boundary Line has been run and marked by the Commissioners of the States of New York and Pennsylvania respectively and from the said point or place of Beginning running west upon the said Line to a meridian which will pass through that corner or point of Land made by the confluence of Thanahasgwaicon creek with the waters of the Genisee River, thence north along the said meridian to the Corner or point Last mentioned, thence northwardly along the Waters of the said Genisee River to a point two miles north of Thanawageras Village, so called; thence running in a direction due west twelve miles; thence running in a direction northwardly so as to be twelve miles distant from the most westward bounds of the said Genisee River to the Shore of the Ontario Lake; thence eastwardly along the Shores of the said

Lake to a meridian which will pass through the first point or place of beginning aforementioned; thence south along the said Meridian to the first point or place of beginning aforesaid, being such part of the whole Tract purchased by the Grantees as aforesaid as they have obtained a Release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging. To have and to hold the same to them the said Nathaniel Gorham & Oliver Phelps, their heirs & Assigns forever, as Tenants in common & not as Joint Tenants.

This Act of the Legislature follows precisely the description of the Indian deed, bounding the tract by the same courses and monuments except in a few particulars. The words, "bends of the Genesee River" in the description of the western boundary are changed to "bounds of the Genesee River", and the clause in the Indian deed, "together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory", is omitted and there is inserted the language, "being such part of the whole tract purchased by the grantees as aforesaid, as they have obtained a release of from the natives, together with all the appurtenances to the aforedescribed tract belonging."

III.

THE SETTLEMENT WITH PHELPS AND GORHAM

(a) It appears by the recitals in subsequent indentures that one of the bonds of Phelps and Gorham (being the first of three bonds for £100,000 each, mentioned in the Resolve approved April 1, 1788, falling due April 1, 1789) was not paid when due, and suit was brought upon this bond by the Commonwealth of Massachusetts.

In February, 1790 Phelps and Gorham submitted certain proposals to the Legislature of Massachusetts for modification of the contract made by the resolve of the

Massachusetts Legislature approved April 1, 1788 (Res. 1787, c. 135) in which the Commonwealth had agreed to convey to Phelps and Gorham on certain terms and conditions all the lands ceded to Massachusetts by the Treaty of Hartford. The proposals of February 15th were substantially that Phelps and Gorham should reconvey to the Commonwealth two-thirds in quantity and quality of the whole lands agreed to be conveyed to them in the Resolve of 1787, c. 135, and should be released of two of the three bonds held by the Commonwealth, the land already purchased by Phelps and Gorham of the Indians and confirmed by Massachusetts to be included within the lands not so reconveyed; with certain provisions as to ascertaining how the exact two-thirds should be determined, and for certain compensation should the lands already purchased from the Indians be greater or less in value than one-third of the whole land, with other terms not necessary to set out. Certain other proposals were made by Phelps and Gorham on February 26th, and at a later date. On June 9, 1790, an indenture was executed by and between the Commonwealth of Massachusetts and Phelps and Gorham, (Res. 1789, c. 153) wherein the various proposals of Phelps and Gorham were recited and certain of said proposals (being the proposals of February 26, taken together with two clauses of additional proposals) were accepted (reserving to the Commonwealth the right of accepting in preference at any time within one year the proposals of February 15 provided that if on division of the lands it should appear "that the value of the said lands in which the said Gorham and Phelps have already extinguished the native right, shall exceed the one-third part of the value of the whole of the said territory" then Phelps and Gorham should purchase the overplus) and by which said Phelps and Gorham granted, released, quit-claimed and confirmed to the Commonwealth, their grantees, and the heirs and assigns of the grantees of the Commonwealth

> "All that right of pre-emption of the soil from the native Indians, and all other the estate, right title and

property which the said Commonwealth had by virtue of the Deed of cession and agreement executed in behalf of the said Commonwealth and of the State of New York, by their respective Commissioners at Hartford on the sixteenth day of December Anno Domini seventeen hundred and eighty six, or otherwise, and which the said Gorham and Phelps now have, or might have by virtue of the said Resolve of the first day of April, Anno Domini seventeen hundred and eighty eight, or by virtue of any other Resolve or Act of the said Commonwealth or by virtue of any purchase from the said native Indians, or from any other person or persons, State or Corporation, and all other the claims and demands of the said Gorham and Phelps of in or to, two undivided third parts of the said territories and lands in the said Deed of cession described, and by the said State of New York ceded and confirmed to the said Commonwealth, reference thereto being had, and lying eastward of the said line of cession from the said Commonwealth to the United States, saving and reserving only to the said Gorham and Phelps their heirs and assigns, that in the division of the said territories and lands, the third part thereof retained, and which shall be assigned in severalty to the said Gorham and Phelps their heirs or assigns, shall be set off within that part of the said territories and lands which is already by them purchased of the said native Indians, and shall as far as possible comprehend their sales already actually made; and also that such purchase of the Indians, and the buildings and improvements which have been made and procured to the said third part retained as aforesaid, shall not be estimated in such division."

It was further provided in the indenture that if these lands in which Phelps and Gorham had already extinguished the rights of the Indians exceeded an equal third part of the whole lands, the subject of the conveyance, then

Phelps and Gorham would purchase such overplus. The text of this provision is as follows:

> "And the said Gorham and Phelps for themselves their heirs and assigns hereby bargain and agree to and with the said Commonwealth, and the said Commonwealth hereby bargain and agree, to and with the said Gorham and Phelps, their heirs and assigns, that in case that part of the said lands and territories in which the said Gorham and Phelps have already extinguished the native right, and which is confirmed to them by an act or grant of the said Commonwealth passed on the twenty first day of November Anno Domini seventeen hundred and eighty eight, doth exceed an equal third part, according to the estimation aforesaid, of the whole of the said lands and territories lying eastward of the said line of cession to the United States, then the said Gorham and Phelps, their heirs or assigns shall and will purchase, and the said Commonwealth, or their assigns shall and will sell and convey to the said Gorham and Phelps, their heirs or assigns all such overplus or residue of land, more than such one third as aforesaid lying and being within the bounds in the said Act or grant last mentioned described, to hold as therein mentioned, the said Gorham and Phelps their heirs or assigns paying therefor to the said Commonwealth or their assigns at the same rate and proportionably as the said Gorham and Phelps have agreed to pay for the one third part of the said territory retained by them as aforesaid."

The indenture further provided for the third part to be ascertained by Commissioners appointed within one year from the date of the indenture, and also for the possible acquisition by Phelps and Gorham of an undivided two-fourths in the two-thrids, on certain terms and conditions and for the release and cancellation of two bonds of Phelps and Gorham of £100,000 each.

The indenture, however, expressly reserved to the Commonwealth the right at any time within one year from

March 5, 1789, by notice to Phelps and Gorham, to assume and hold its title to the "released two-thirds parts" of the western lands. This provision reads as follows:

> "Provided also and reserving to the said Commonwealth and their assigns, and it is further mutually understood and agreed by and between the said parties to this Indenture, that the said Commonwealth or their assigns, shall and may at any time within one year next ensuing the said fifth day of March last assume and hold giving notice thereof to the said Gorham and Phelps or either of them, or to their heirs or assigns all and singular the said right of pre-emption, and all other the estate and property which the said Commonwealth or their assigns have or shall have by virtue hereof, or otherwise, to or in the said released two third parts of the said lands and territories subject only to the claim of the said Gorham and Phelps, or their heirs or assigns, to the said overplus or residue of lands, if any shall be found as aforesaid, the bargains and agreements herein before made respecting the two fourth parts of the said two thirds notwithstanding and fully acquitted thereof . . ."

There is no evidence that the inquiry as to the overplus was ever had, or that it was ascertained that there was an overplus, and Phelps and Gorham retained their right and title in the tract conveyed to them by the Massachusetts grant of November 21, 1788 (Statutes of 1788, Chapter 23) being the particular tract obtained from the Indians by Phelps and Gorham.

(b) By Resolve 1790, Chapter 44, approved February 16, 1791, the Legislature of Massachusetts appointed a committee consisting of Samuel Phillips, Walter Spooner, David Cobb, Thomas Davis and William Eustis, "with full power to make a final and absolute settlement" with Phelps and Gorham relative to the bond for one hundred thousand pounds in State Notes given by them to the Commonwealth.

This committee on March 10, 1791, entered into an indenture with Phelps and Gorham by which Phelps and Gorham agreed to settle the bond for one hundred thousand pounds by payment at the rate of six shillings in specie for each twenty shillings of notes, and by Resolve of February 18, 1791 (Res. 1790, c. 45), the Legislature determined the two undivided third parts of the "western lands" referred to in the indenture of June 9, 1790, should be the exclusive property of the Commonwealth of Massachusetts. This resolve is as follows:

> Resolve Determining the Two Undivided Third Parts of the Western Lands, to be the Exclusive Property of this Commonwealth, and Directing the Secretary to Comunicate to Messrs. Gorham and Phelps, this Determination of the Legislature.
>
> Whereas by a certain contract made between this Commonwealth on the one part and Nathaniel Gorham and Oliver Phelps Esquires on the other part, it was among other things covenanted and agreed, that the said Gorham and Phelps should be interested in two undivided third parts of certain western lands belonging to the said Commonwealth, in the manner and on the conditions in said Contract expressed, unless the Legislature of the said Commonwealth, within one year from the date of the resolution on which the said contract was founded, should otherwise elect and determine.
>
> RESOLVED that the said two undivided third parts of the said western lands shall remain the exclusive property of this Commonwealth and that this the election and determination of the said Legislature be communicated and made known to the said Gorham and Phelps, by the Secretary of the said Commonwealth who is hereby directed, as soon as may be, to deliver to them or to one of them, an attested Copy of this

Resolution, and to make Record of his doings in consequence of this Resolution.

IV.

SALE BY MASSACHUSETTS OF THE REMAINING LANDS

(a) Thereafter the Legislature of Massachusetts began proceedings for the disposition of all the "western lands" which had not been sold to Phelps and Gorham, being approximately two-thirds of all the lands, and those which the legislature had retained and as to which Phelps and Gorham had released any claim they might have. These lands to the west of the Phelps and Gorham purchase do not include any territory in which the parcel in dispute in this case is located, but the negotiations, the acts and resolves of the legislature, and the deeds made by the Commonwealth of Massachusetts are proper to refer to, for such bearing as they may have upon the purpose and intent, necessary to be considered in construing the deeds upon which the respective claims rest in this case. On March 8, 1791, the legislature by Resolves 1790, Chapter 121, as amended by the Senate and concurred in by the House, appointed a committee consisting of Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis (the same persons acting for the Commonwealth in the indenture of March 17, 1791, except that Wells replaced Spooner) to bargain and sell to Samuel Ogden the title and interest which the Commonwealth then had in the "western lands", for £100,000. The lands were described in this Resolve, as amended by the Senate, as follows

> "All and singular the right of preemption, and all other the title and interest of this Commonwealth in and unto all that tract of land lying in the State of New York, the right of pre-emption whereof the State of New York ceded, granted, released & confirmed to this Commonwealth, their Grantees and the heirs and assigns of such Grantees forever, saving and excepting such part or parts of said Tract the right of pre-emp-

tion whereof this Commonwealth has ceded and granted to the United States of America and also saving & excepting such part or parts of the same Tract the pre-emption right to which now belongs to Nathaniel Gorham & Oliver Phelps, Esqrs. their heirs and assigns by virtue of any grant or confirmation from this Commonwealth, however the same Tract is or may be bounded or described & also reserving one undivided sixtieth part of said tract excepting such parts thereof as belong to the said United States and said Gorham & Phelps by virtue of any cession from this Commonwealth."

As originally drafted in the House of Representatives, this description read:

"All and singular the right of pre-emption and all other the title and interest which this Commonwealth hath in and to a certain tract or parcel of land situate in the State of New York being part of the land ceded by the State of New York to this Commonwealth which tract or parcel of land is bounded Westerly on Lake Erie and on land late belonging to the United States and by them conveyed to the State of Pennsylvania, Southerly, on the State of Pennsylvania Easterly on land the property of Nathaniel Gorham and Oliver Phelps Esq. and their assigns and Northerly on Lake Ontario."

Shortly thereafter, but on what date it does not appear, the Committee made a full report of its acts and proceedings to the legislature. In this report the Committee stated that it acted "with authority to sell and convey to Samuel Ogden, Esq. his heirs and assigns, the right of pre-emption and all other the title and interest of the Commonwealth to that part of the lands lying in the State of New York the right of pre-emption whereof the State of New York had ceded to this Commonwealth and which had not been by them before otherwise ceded or granted" reserving the sixtieth part. They reported that on March

12th they made covenant of indenture with Samuel Ogden that they would execute to him, his heirs and assigns, a deed of the "right of the Commonwealth to the land which by the Resolve above mentioned they were authorized thus to convey" on certain security: that on May 11th Ogden assigned the aforesaid covenant to Robert Morris, and that the Committee "conveyed by deed the pre-emptive and other right of the Commonwealth to a Tract of the aforesaid lands, adjoining to the land confirmed to Messrs. Gorham & Phelps estimated at about 500,000 acres"; that the Committee having thus conveyed the Commnowealth's right aforesaid to only about 1/8 part of the Tract in question, they made to the said Morris four other deeds to the remainder of the said Tract, as follows: 1. A deed of the aforesaid right to about 800,000 acres "beginning on the North Line of the State of Pennsylvania, 12 miles from the Southwest Corner of the lands confirmed to Messrs. Gorham & Phelps, and extending 16 miles on the line aforesaid." 2. A deed of the tract beginning "on the aforesaid North line of Pennsylvania 28 miles from the Southwest Corner of land confirmed to Messrs. Gorham & Phelps and extending 16 miles on the same line." 3. A deed of a tract which "begins on the line aforesaid 44 miles from the point of beginning described in the foregoing deeds and extends 16 miles on the same line." 4. A deed of a tract which "begins on the line aforesaid at the distance of 60 miles from the aforesaid point of beginning and comprehends all lands remaining in the tract in question." Accompanying the report were all the deeds referred to.

The sixtieth part to be reserved by the Committee had been purchased by one Butler and by him sold to Morris, so that Morris had previously acquired the right to the sixtieth part.

(b) The report of the Committee was approved by the legislative Resolve June 17, 1791 (Resolves, 1791, Chapter 65). This approval of the report is in the language following:

"On the report of the Committee appointed by the general court on the 8th day of March last, with authority to sell & convey to Samuel Ogden, Esq. his heirs & assigns, the right of pre-emption & other the title & interest of the Commonwealth to that part of the lands lying in the state of New-York, the right of pre-emption whereof the said state of New-York had ceded to this Commonwealth & which had not been by them before otherwise ceded or granted."

"RESOLVED, that the same be, & hereby is approved, & that the several papers described in the said report, and accompanying the said Report after the same shall have been recorded in the Secretary's office of this Commonwealth, be deposited in the Treasurer's office of the Commonwealth, to be put on file with the other papers there already deposited relative to the same subject."

(c) The indenture by which the Commonwealth agreed to execute the conveyance to Ogden, accompanying the Committee's report, and approved by the legislature, was dated March 12, 1791. It was made by the Committee acting on behalf of the Commonwealth with Samuel Ogden of Pennsylvania; it recited that whereas the General Court of the Commonwealth had appointed the Committee with "full power and authority to bargain and sell to said Samuel Ogden . . . the right of pre-emption, and all other the title and interest of the same Commonwealth of Masachusetts of & unto all that tract of land lying in the State of New York the right of pre-emption whereof the State of New York ceded, granted, released and confirmed to the said Commonwealth of Massachusetts" saving and excepting the part granted by Massachusetts to the United States and "the parts the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps, esquires," and reserving the sixtieth part of said tract excepting the parts belonging to the United States and Phelps and Gor-

ham, "in pursuance of and by virtue of which authority aforesaid" the Committee covenanted.

The premises subject of the covenant were bounded and described as follows:

> "All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie, and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east from the northern termination of said streight or waters, and which premises to be conveyed, are to extend on the line of said tract belonging to the State of New York to the south shore of Lake Ontario, then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending untill a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth of Massachlsetts by an Act of the Legislature thereof passed the twenty-first day of November seventeen hundred and eighty-eight. And the said premises to be bargained & sold as aforesaid by virtue of the powers contained in the Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so up on that line westwardly to the place of beginning where that line meets the tract lately ceded by the said United States to the said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof, . . ."

(d) The deed to Robert Morris of May 11, 1791, referred to in the report of the Committee, and approved by

the Legislature, being the first of the five deeds to Robert Morris after the assignment by Ogden of his rights to Morris, contains the following recital:

> "WHEREAS, the General Court of the Commonwealth of Massachusetts by their Resolve of the eighth day of March in the year of Our Lord One thousand seven hundred and ninety-one, did appoint Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis, Esquires, a Committee with full powers & authority to bargain, sell & convey to Samuel Ogden, Esquire, his heirs & assigns, all & singular the right of pre-emption & all other, the title & interest of the said Commonwealth, in & into all that tract of Land lying in the State of New York, the right of Pre-emption whereof, the State of New York ceded granted released & confirmed to the Commonwealth of Massachusetts, their Grantees & the heirs & assigns of such Grantees forever, saving & excepting such part or parts of said Tract, the right of pre-emption whereof the said Commonwealth has ceded & granted to the United States of America, & also saving & excepting such part or parts of the same Tract, the preemptive right to which now belongs to Nathaniel Gorham and Oliver Phelps Esquires their heirs or assigns, by Virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described, & also reserving one undivided sixtieth part of said Tract, excepting such parts thereof as belong to the said United States & said Gorham & Phelps, by Virtue of any Cession from the Commonwealth aforesaid.
>
> "And whereas the above named Committee pursuant to the resolve aforesaid did by their Deed of Indenture bearing date the Twelfth day of March last, in Consideration of the Covenants in the same Indenture mentioned, Covenant & agree with the said Ogden, that they would sell & convey to him his heirs & assigns,

the pre-emptive & all other right & title which the said Commonwealth, empowered the said Committee to convey by the Resolve aforesaid."

The land conveyed is described as follows:

"The preemptive right & all other right title & interest which the said Commonwealth hath to a certain tract or parcel of land being part of the Territory above described, which parcel contains about Five hundred thousand Acres more or less & is bounded as follows to wit. Westerly by a Meridian line drawn from a point on the North Line of the State of Pennsylvania twelve miles west of the South west corner of the Land confirmed to Nathaniel Gorham & Oliver Phelps to the Line in Lake Ontario which divides the Dominion of the King of Great Britain & the United States Northerly by said dividing line easterly by the Land confirmed to Nathaniel Gorham & Oliver Phelps by the Legislature of the Commonwealth of Massachusetts by An Act passed November the twenty first One thousand seven hundred & eighty eight & Southerly by the said North line of the State of Pennsylvania, reserving out of the same granted premises one undivided sixtieth part thereof."

(e) By Resolve of the Legislature of Massachusetts of June 20, 1792, the Commonwealth, after reciting that the one-sixtieth part of the tract referred to in the deed to Ogden and Morris had been reserved because Gorham and Phelps had previously contracted to convey the same to John Butler and Robert Morris had purchased said sixtieth part from John Butler, released and conveyed to the said Robert Morris all the right, title and interest which the Commonwealth had or could have to the said undivided sixtieth part. This Resolve contained recitals of the previous conveyance made of the "Western Lands." After reciting the agreement to sell to Phelps and Gorham all the western territory, and the subsequent reconveyance by

Phelps and Gorham, recited that the Commonwealth had sold and conveyed to Robert Morris "all and singular the right and title which the said Commonwealth had to the same part of said territory so reconveyed by the said Gorham and Phelps to the said Commonwealth according to the tenor of the deed for that purpose executed reference to the same being had," but reserving among other things one undivided sixtieth part.

(f) In 1797 Robert Morris acquired the Indian rights in all the lands conveyed in the five deeds of May 11, 1791, being approximately the western two-thirds of the so-called "western territory." This was accomplished by a treaty with the Indians known as the treaty of Big Tree made at Genesee between the Seneca Indians and Robert Morris, September 15, 1797, in the presence and with the approval of the representative of Massachusetts, William Shepard acting pursuant to a Resolve of the Massachusetts Legislature of March 11, 1791.

The Big Tree treaty is found in Vol. 7, Statutes at Large, p. 601, and Vol. 2, "Indian Affairs", pp. 1027-1030. The Indian grant to Robert Morris is as follows:

> "All that certain tract of land, except as hereinafter excepted, lying within the County of Ontario, and State of New York, being part of a tract of land, the right of pre-emption whereof was ceded by the State of New York to the Commonwealth of Massachusetts, by a deed of cession executed at Hartford, on the 16th day of December, in the year of our Lord one thousand seven hundred and eighty-six, being all such part thereof as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham, and bounded as followes, to-wit: easterly, by the land confirmed to Oliver Phelps and Nathaniel Gorham, by the Legislature of the Commonwealth of Massachusetts, by an act passed the twenty-first day of November in the year of our Lord one thousand seven hundred and eighty-eight; southerly, by the north boundary line

of the State of Pennsylvania; westerly, partly by a tract of land, part of the land ceded by the State of Massachusetts to the United States and by them sold to Pennsylvania, being a right-angled triangle, whose hypothenuse is in or along the shore of Lake Erie; partly by Lake Erie, from the northern point of that triangle to the southern bounds of a tract of land one mile in width, lying on and along the east side of the strait of Niagara, and partly by the said tract to Lake Ontario, and on the north, by the boundary line between the United States and the King of Great Britain, excepting nevertheless, etc."

(g) In a Resolve of the Legislature of Massachusetts March 8, 1804, (Chap. 155, Resolves 1803) it was set forth that the treaty with the Seneca Nation of Indians was held before Jeremiah Wadsworth, Commissioner of the United States in the presence, and with the approbation of William Shepard, a Superintendent appointed for that purpose on the part of the Commonwealth of Massachusetts and that by such treaty Morris extinguished the native rights of the Indians to the lands, the right of pre-emption of which was granted to Morris. This Resolve was in connection with an application by assignees of Robert Morris for confirmation of the purchase from the Indians, and appointed a commission to examine into all the circumstances.

V.

TREATY BETWEEN THE INDIANS AND THE UNITED STATES

By a treaty between the Six Nations and the United States, executed at Canandaigua on November 11, 1794, known as the Pickering Treaty (7 Stat. at L. 44), the Indians formally disclaimed any rights east of the west line of the Phelps and Gorham tract. A representative of the United States at the execution of said treaty was Timothy Pickering of Massachusetts, Secretary of War and, later, Secretary of State under President Washington.

Under Article III of that treaty the United States acknowledged all the land within boundaries set forth to the west of the Phelps and Gorham purchase, to be the property of the Seneca nation. In that treaty those boundaries were described in part as follows:

> "Beginning on Lake Ontario at the Northwest corner of the land they sold to Oliver Phelps, the line runs westerly along the lake as far as Oyongwongyeh Creek, etc. . . . then north and northerly along said Phelps line to the place of beginning on Lake Ontario."

VI.

EARLY CONVEYANCES BY PHELPS AND GORHAM AND EARLY SURVEYS

(a) Between November 1, 1788 and October 4, 1814, Phelps and Gorham made duly recorded conveyances of certain undivided interests and certain other interests in the tract conveyed to them by Resolve of 1788.

By indenture dated November 18, 1790, Phelps and Gorham conveyed to Robert Morris all the lands granted to them in the Resolve of 1788 which had not been theretofore sold to other persons, and reserving certain of the tracts for themselves. The territory so received by Phelps and Gorham by the Resolve of 1788 was estimated to contain 2,800,000 acres, and the tract conveyed to Morris, being all the land not theretofore conveyed and not reserved, was estimated to contain approximately one million acres. This indenture recited that Phelps and Gorham had caused the entire tract to be divided into townships and ranges, and each range was specifically described and a map attached showing the location and indicating the persons to whom various ranges had already been sold. In the description, in the indenture, of the various ranges in which the tract had been divided the expression "to Lake Ontario" and the expression "to the shore of Lake Ontario" were used interchangeably and synonymously.

Among the conveyances of undivided interests in the tract were the following:

In 1790, two years after the purchase, Phelps and Gorham conveyed to William Ewing, by warranty deed, a one-sixteenth part of Township 2 in the Short Range (which includes the lands in question in this case), by a description as follows:

> "Situated on the west side of Genesee River, bounded on the east by said River and on the north by Lake Ontario."

In 1791, Oliver Phelps conveyed by warranty deed to Sturgin Sloan a one-sixteenth part of said Township, using in the description the words:

> "Said Township bounding north on Lake Ontario and east on the Genesee River."

In 1794, Oliver Phelps conveyed by warranty deed to Mary Crosby a one-sixteenth of said Township, saying:

> "Which Township is bounded north on Lake Ontario and east on the Genesee River."

(b) In 1803, William Shepard, acting for Phelps and Gorham, and divers persons, including one Sir William Pulteney, to whom Phelps and Gorham had conveyed a certain undivided interest, made a survey in which Shepard laid out a portion of the Phelps and Gorham purchase into ranges and townships, including township 2, short range, west of the Genesee River, the village of Charlotte (now within the limits of the city of Rochester) and town lots 20 and 21.

The notes of this survey were deposited in the land office at Bath, New York, and subsequently copied and recorded as a public document in the office of the county clerk of Monroe County. These notes show the south lines of lots 20 and 21 (which have remained substantially the same ever since) and the courses and distances (from these fixed south lines) to mark the east and west boundary lines of lots 20 and 21. As shown by the notes, a highway or street,

1.50 chains wide called Main Street was laid out between lots 20 and 21 with lot 20 on the west and lot 21 on the east. The center line of this highway was described as follows: "From it (a white oak stake on the north line of lot 30) ran a line N. 28° E. for the center of a highway or Main Street 82.25 (chains) to the shore of Lake Ontario." The east line of lot No. 20 (running along the west line of Main Street) was described as follows: "from the N. E. corner of lot 19 continued the line, being the easterly line of lot No. 20, 5.25 (chains) to the beach of the lake where I set an elm post marked S. W. No. 20 & S.E.H. from it an ash straddle bears S. 79 W. dist 0.33 mkd. 20." The west line of lot 20 began 10 chains to the west of the east line, at a chestnut post and was described as follows: "Continued the line 8.53 (chains) to the beach of the lake where I set a chestnut post marked S. E. No. 20 from which is an ash tree S. 1½° W. dist 0.25."

The west line of lot 21, which was the east line of Main Street, began at a post in the north line of lot 22 and was described as follows: "Continued the line 5.26 (chains) to the beach of the lake and set a B. Ash post marked S. E. No. 21 S.W.H. from wh. an ash tree bears S 46° W dist 0.25." The east boundary of lot 21 was the Genesee River.

The notes also described a "traverse of the Lake Shore of lot 34 (which was just west of lot 20) and a traverse of lots 20 and 21, by courses and distances. The traverse was: First course south 44½° E. 10.94 chains "to the west line of Main Street & S. E. corner of lot No. 20. Thence S. 62° E. 1.50 (chains) to the East Line of Main Street on the Lake Shore. Then on the Lake shore of lot No. 21 from Main Street east line: First cs (course) S. 42 E. 8.00; 2nd cs (course) S. 8 E. 7 (chains) to the traverse of Genesee River and set a stake being at the N. E. corner of the Township."

(c) On October 4, 1804, by a deed of partition to which Phelps and Gorham and Sir William Pulteney were parties, there was conveyed to Sir William Pulteney "according

to survey and map of the same made by William Shepard hereunto annexed and to which reference is herein had, the following town lots in said township ** Nos. ** 21 ** 20." The map attached to the deed is a small sketch approximately 6 in. long by 5 in. wide, and contains no marks of courses, distances or monuments. The scale is so small that in the town site lot lines of 4 chains are indicated by cross lines less than 1/16 of an inch apart. The lot lines run to the edge of the lake, and there are no lines indicating a distinction between beach and upland.

(d) A subsequent survey of lot 21 was made by David Finley in 1810 for Sir William Pulteney. The map and field notes of this survey were duly recorded (sometime subsequent to 1878) in the office of the County Clerk of Monroe County, New York.

The Finley map in evidence is entitled "Map of Charlotte" and shows a number of lots along the Genesee River south of Lake Ontario, including lots 20 and 21 bordering on the lake. Lot 21 is shown as bounded on the north by the lake and running east and west from a street called "Broadway" on the west to a street called "Water" street on the east. A small triangular lot, indicated as Sections 1 and 2 of lot 21, is shown between Water street and the Genesee river. The Field Notes in evidence describe the boundaries of lot 21, and the two small sections bordering on the Genesee river at the mouth.

The Field Notes show the courses under a column headed "Courses" and the distances under two columns headed "Distances, chains,—links". The description is as follows:

"Beginning at a post standing in the S. E. Corner of said lot marked No. 21, No 22 H [with the words 21 over the words No. 22, and a line in between, and the letter "H" at the right] thence on the SOUTH LINE (course) N. 61° 45 W. (chains) 5 (links) 20 over low marshy ground to a ridge of dry land in a N. W. and S. E. direction; (chains) 5 (links) 70 over said ridge to a marsh; (chains) 7 (links) 20 the marsh to upland; (chains)

9 (links) 73 thro' thick underbrush of oak and hickory to a post marked H. No. 21, No. 22; thence on the WEST LINE (course) N. 28° 15 E. (chains) 3 (links) 20 over upland timbered with white oak and hickory to a marsh; (chains) 4 (links) 40 across the marsh to the beach or sand bank; (chains) 5 (links) 08 to a post marked H No. 21 [over the words H No. 21 are three wavy lines] standing on the shore of Lake Ontario. Thence on the NORTH LINE (course) 47° E. (chains) 5 (links) 94 along the shore of said lake (course) S. 30° 30 E. (chains) 4 (links) 20 along the shore of said lake to a post marked No. 21 H [with a line over the words No. 21]. Thence on the EAST LINE (course) S. 28.15 W. (chains) 1 (links) 64 to the place of beginning timbered with a few small poplars, Area 3.69 acres."

The notes of this survey of Lot 21 show that the surveyor, in stating the direction and distance of the west line running from the S. E Corner of the lot towards the river, described the line as running a certain number of chains across the marsh "to the beach or sand bank", and then as continuing northwardly a substantial distance (68 links) further to a post standing on the shore of Lake Ontario upon which was marked, in addition to certain lot symbols, with another symbol consisting of wavy lines, which indicate and would be interpreted by a surveyor as indicating water.

In the description of the two sections of Lot No. 21, east of Water street, called Sections 1 and 2, the Field Notes again show wavy lines on the terminal posts of lines running toward the water. In the survey of Section No. 1, the east line (extending toward the river at its mouth) is described as running in a southerly direction 4 links "along the shore of the lake to a post marked S 1 21 S 2 No. 21", followed by three wavy lines. In the description of Section No. 2, the east line is described at "thence on the east line 93 links to a post marked S 2 No. 21, No. 22", followed by four wavy lines.

The exact form of the Finley Field Notes, as nearly as it can be represented in type, is shown below:

Lot No 21. Cont $3\frac{69}{100}$ Acres

Distances Courses	chs-lks	Begin at a post standing in the S.E. Corner of said Lot Mark $\frac{\text{No 21}}{\text{No 22}}$ H Thence on the
		South Line
N61.°45W	5 20	over low marshy ground to a ridge of dry land in & N W & S.E. direction
	5 70	over said ridge to a marsh
	7 20	the marsh to upland
	9 73	thro' thick under brush of Oak & Hickory to a post mark $\frac{\text{H}}{\text{No 21}}$ $\frac{\text{No 21}}{\text{No 22}}$ thence on the
		West Line
N28.°15E	3 20	over upland timbered with White Oak & Hickory to a marsh
	4 40	across the marsh to the beach or sand bank
	5 08	to a post mark H | No 21 standing on the shore of Lake Ontario Thence on the
		North Line
S47°E	5 94	along the shore of said Lake
S30°30E	4 20	along the shore of said Lake to a post mark $\frac{\text{No 21}}{\text{H}}$ H. Thence on the
		East Line
S28.°15W	1 64	to the place of beginning timbered with a few small Poplars

Area $3\frac{69}{100}$ Acres

Section No 1 Lot No 21. Cont $^{g}\frac{2}{100}$ of an Acre

Distances Courses	chs-lks	
		Begin ^{g} at a Post Mark ^{d} H S.N 21 standing in the N. W. Corner of said section Thence on the East Line
S 11°E	1 04	along the shore of the Lake to a post mark $^{d}\frac{\text{S.1.No21}}{\text{S.2No21}}$ thence on the South Line
N61.45W	66	to a post mark ^{d} H $\frac{\text{S1.No21}}{\text{S2No21}}$ Thence on the West Line
N28.15E	84	to the place of beginning

Area $\frac{2}{100}$ of an Acre

Section No. 2 Lot No 21. Cont $^{g}\frac{7}{100}$ of an Acre

Distances Courses	chs-lks	
		Beginning at a Post Mark ^{d} H $\frac{\text{S.1 No21}}{\text{S2No21}}$ standing in the N.W. Corner of said section & on the East bounds of Water Street Thence on the North Line
S61.45E	66	to a post mark $^{d}\frac{\text{S.1No21}}{\text{S 2No21}}$ on the shore of Genesee River Thence on the East Line
S5° W	93	to a post mark $^{d}\frac{\text{S2No21}}{\text{No22}}$ Thence on the South Line
N61.45W	1 04	to a post on the east bounds of Water Street mark ^{d} H $\frac{\text{S.2No21}}{\text{No22}}$ Thence on the West Line
N28.15E	84	to the place of beginning

Area $\frac{7}{100}$ of an Acre

The West line of Lot No. 21 in the Finley survey apparently started at substantially the same point as the west line of Lot 21 in the Shepard survey. The length of that line was very nearly the same in both the Shepard survey and the Finley survey, the slight difference being easily accounted for by the probable change in the water line during the seven years intervening between the Shepard and Finley surveys, or the accidental difference in the height of the water at the time the surveys were made. The Shepard survey described the west line of Lot No. 21 as running "to the beach of the lake and set a B Ash post"; the Finley survey described the line as running to the beach or sand bank and then *beyond* a substantial distance to a post marked with wavy lines, indicating water.

VII.

CONVEYANCES BY SUCCESSORS OF PHELPS AND GORHAM

(a) The partition deed of October 4, 1804, between Phelps and Gorham, Robert Morris, Sir William Pulteney and others, conveyed to Sir William Pulteney all the right, title and interest in town lots 20 and 21 which passed to Phelps and Gorham by the conveyance to them by the Commonwealth of Massachusetts; Lots 20 and 21 remained in the ownership of Pulteney and his heirs or devisees until sometime shortly before 1863. Through Sir William Pulteney, by various and divers wills and descents and mesne conveyances the several individuals and private corporations defendants in this case, claim parcels of Lots 20 and 21, together embracing the part of Lots 20 and 21, north of Beach Avenue.

(b) In a deed from the Earl of Craven (successor in interest to Sir William Pulteney) to Martin McIntyre made in 1868, Lot 21 is described as "in the village of Charlotte adjoining the Genesee River and Lake Ontario." In 1872, McIntyre conveyed to Byrne who in turn conveyed to Patrick Manrow, by the same description. In a deed from

Patrick Manrow to the New York Central and Hudson River R. R. in 1881 Lot 21 is described as "village lot No. 21 bounded as follows: On the east by the Genesee River, on the north by Lake Ontario."

(c) In a deed from the Earl of Craven and others to Whitney and Wilder in 1863 the conveyance is of Lots 20, 23, 25 and 26 "together with all the right, title and interest of the first parties in and to all the lands lying north of Lot 20 to Lake Ontario, and all the land east of Lots 23, 25, and 26 to the middle of the Genesee River."

So far as appears by the descriptions in the deeds in evidence, the successors in interest to Phelps and Gorham treated the property as though the ownership of Lots 20 and 21 carried with it title to the edge of the lake.

VIII.

AS TO SUBSEQUENT REFERENCES TO CLAIM BY MASSACHUSETTS

(a) After the sale to Morris in 1791 there is no affirmative reference in the record to any claim of right remaining in Massachusetts to any land in New York, or on the shore of Lake Ontario, or to any part of the bed of the lake. Nor is there anything in the record to indicate that the officials of Massachusetts were aware or claimed, prior to 1920, that the State of New York, or any person or corporation, might have infringed any right, title or interest secured to Massachusetts by the Hartford Treaty, or claimed by Massachusetts thereunder.

The Hartford Treaty and the conveyance to Phelps and Gorham remained on record in the office of the Secretary of the Commonwealth of Massachusetts, in the office of the Secretary of State of New York and in the deed records of Ontario County.

(b) By Resolve of 1859, Chap. 103, it was provided that the land agent of the Comomnwealth should have charge of certain property. This Resolve read as follows: "Re-

solved, that the land agent shall have charge of all lands, flats, shores and rights in tide waters belonging to the Commonwealth, except the Back Bay lands and other lands and rights now by law provided for" with directions to ascertain the location, extent and description of all such properties and report to the Governor and Council concerning such properties; to investigate title of the Commonwealth thereto, and as to whether there were any encroachments or trespasses thereon. That duty was subsequently transferred to the Board of Harbor and Land Commissioners, and, later, to the Department of Public Works. There is no record of any report with reference to title to or encroachments upon the shore or bed of Lake Ontario.

By statute of 1888, Chapter 318, a similar jurisdiction was conferred in respect to encroachments upon "great ponds."

IX.

MASSACHUSETTS STATUTE OF LIMITATIONS

By the laws of Massachusetts of 1835 (Chap. 119, Laws of 1835, Sec. 12) it was provided:

> "No suit for the recovery of any lands shall be commenced by or on behalf of the Commonwealth, unless within twenty years after the right or title of the Commonwealth thereto first accrued, or within twenty years after the Commonwealth, or those from or through whom they claim, shall have been seized or possessed of the premises."

The law of 1835 remained unamended until 1859 when in the general revision of the statutes of Massachusetts, by Chapter 154 of the laws of 1859, Sec. 12, it was made to read as follows:

> "No suit for the recovery of lands shall be commenced by or in behalf of the Commonwealth, unless within twenty years after the right or title of the

Commonwealth thereto first accrued, or within twenty years after the Commonwealth or those from or through whom it claims, have been seized or possessed of the premises; but the provisions of this section shall not apply to any of the Province lands in the Town of Provincetown, nor to the lands owned by the state in the basins of Back Bay mentioned in section one, chapter two hundred and fifty-three of the Statutes of eighteen hundred and fifty-two."

In 1867 by Chap. 275 it was provided as follows:

"Section 1. The provisions of Section 12 of Chapter 154 of the General Statutes shall not apply to any property, right, title, or interest of the Commonwealth below high water-mark or in the Great Ponds.

"Section 2. This Act shall take effect upon its passage (May 27, 1867)."

X.

AUTHORITY EXERCISED BY NEW YORK

So far as the Record shows the State of New York has always assumed that it owned the land under Lake Ontario, in front of the premises in question. In 1888 a grant was made by the State to the Bartholomay Brewing Co. of two pieces of land, one "under the waters of Lake Ontario, in front of and adjacent to upland of the said Bartholomay Brewing Co., in the Village of Charlotte, in our county of Monroe," extending from the high water mark about 1270 ft. out into the lake; and another to the west thereof, extending the same distance into the lake. In proceedings conducted in the County Court of Monroe County in 1829 to ascertain damages to land owners for the removal of timber between a lighthouse and the water of Lake Ontario, Commissioners appointed pursuant to an act of the legislature authorizing the Superintendent of Lighthouses of Lake Ontario to remove obstructions to light-

houses at the mouth of the Genesee River, showed village lots 20 and 21 on a map as running to the waters of Lake Ontario. The Record shows that for a considerable period taxes have been assessed against the occupants of the premises in question by the taxing authorities of New York, and that a street known as "Beach Avenue", formerly located within the limits of the property involved, but subsequently discontinued, (and relocated further south) was a public street under charge of the village authorities and was discontinued by action of the village board about forty years ago.

XI.

VARIATION IN WATER LEVELS OF LAKE ONTARIO

The height of the water of Lake Ontario (above sea level) has fluctuated irregularly throughout a hundred years or more, the extreme variation being about 5½ ft. occurring over a long period of years. These fluctuations have been observed and recorded, to some extent, since 1815, and these observations establish the various levels. The waters are also higher in summer than in winter, this fluctuation also being irregular and the difference is ordinarily about 2 feet, sometimes as much as 3 feet. There is no other rise or fall of the waters except temporary ones caused by river floods or lake storms.

Government records show monthly mean water levels of Lake Ontario (above mean sea level at New York) for the period 1837 to 1859 inclusive, and from 1860 to 1922 inclusive, and there are also records based upon certain infrequent observations from 1815 to 1827. During this entire period the highest stage of the water was 249 feet above sea level, and the lowest stage 243.5. During the period 1815 to 1827 the water did not, at any time, reach above 247. From 1860 to 1922 there were periods of many years when the water did not exceed 247. The mean elevation of the lake waters during this period was estimated at a fraction over 246 feet—246.19. These records, taken with

such indications as the land marks gave of the probable height of water in the region, afford no satisfactory basis for determining any fixed or settled mark that might be accurately called "ordinary high water" or "ordinary low water." Various theories were submitted as to what should be considered "ordinary high water" and "ordinary low water." One estimate made by taking averages of heights above the estimated mean, was 246.98 feet. Another estimate was 248 to 248½ feet.

XII.

SHIFTING OF WATER LINE OF LAKE ONTARIO

(a) Since the Hartford Treaty and the conveyance to Phelps and Gorham, the water line of Lake Ontario near the mouth of the Genesee River has shifted from time to time. The first government map was made in 1829 in preparation for the building of piers in Charlotte harbor at the mouth of the Genesee River. Another survey made in the same year by Commissioners appointed under the law of the State of New York shows the water lines substantially as shown on the government map. In 1829 a government pier or wall was projected to be built on the shore of the Genesee River near its mouth extending along the eastern boundary of Lot 21 in the village of Charlotte and was subsequently (between 1830 and 1840) completed and later extended for a distance of some thousand feet or more into the lake. Maps found in the files of the War Department show the result of various surveys made since the pier was built. These maps indicate where the water's edge was in 1838, 1844, 1870, 1888, 1896 and 1902, as compared with the water's edge in 1829 when the first government survey was made. These maps show that the water line has gradually moved northward, the greatest change being from 1829 to 1844, with a further recession since the latter date. The extreme distance from 1829 to the date of these proceedings, was over 1300 feet on the eastwardly side of Lot 21.

(b) There is no proof from which it can be definitely determined where the edge of Lake Ontario near the mouth of the Genesee River was in 1788 when Massachusetts conveyed to Phelps and Gorham. The earliest record of any survey is that made by William Shepard in 1803. That survey fixed the south lines of Lots 20 and 21 which have remained substantially the same ever since; the courses and distances given in the Shepard Field Notes, starting from the south line of Lots 20 and 21 as a fixed and unchanging line and going northward toward the lake if applied to land on the border of the lake as now existing, show that the lands described in the Bill of Complaint and the subject of the claim of title in this case, are outside of the limits of the Shepard lines, and to the northward thereof; the property in dispute therefore is land added to the north of Lots 20 and 21, as bounded and described in the Shepard survey. The area of Lot 21 according to the Shepard lines was 3.17 acres and the area of the present land bounded by the south line of Lot 21 by the river and by the street to the west is about 21 acres. The area of Lot 20 of the Shepard survey was 6.89 acres and the area of the original Lot 20 plus the land now lying north of it is about 13.43 acres.

XIII.

ACCRETIONS

(a) The land including the premises in question in this case, was long ago formed by gradual and imperceptible additions from year to year, due to the washing up of the sands of the lake and the receding of the waters, accelerated by the conditions produced by the building of a government pier at the mouth of the Genesee River out into the lake. On this subject Attorney General Cushing in an opinion (introduced in evidence) dated July 3, 1855 to the Secretary of War in answer to a question as to the rights of the United States to lands formed near the mouth of the Genesee River, found that the village of Charlotte had long since been laid out by the proprietors of the land, on

the margin of Lake Ontario and of the River Genesee, on the west side of the river; with a street (Main street) extending southwardly from the margin of the lake; that on the east side of Main street were nine lots numbered from 21 to 29, containing about 4 acres each, bounded on the west by Main street, on the north and south by red lines drawn at right angles to Main street and extending eastwardly to the lake or to the river, according to locality, Lot 21 extending from Main street eastwardly to the lake; that a pier or wall had been begun by the government, although not at that time finished, and that in consequence of the building of the pier, part of Lot 22 (just south of Lot 21) originally marsh or covered with water, had become dry land by gradual alluvial formations or accretion or by the recession of the waters of the Genesee River or Lake Ontario; the margin of the water of the lake having retired considerably from its former water mark on the shore of the village of Charlotte; that the United States had not any right or title to the shore of Lake Ontario or its bed, and that not owning the land on which the pier was placed the United States had not owned the accretion to it "for the property of the accretion follows that of the previous main land"; that it was immaterial what may have been the immediate cause of the accretion whether works voluntarily constructed by the government or wrecks.

(b) The exact manner in which the land was formed since the Shepard survey in 1803 is not clear. The testimony, including that from witnesses whose recollection went as far back as 1851, and including the examination of test pits dug in the property in order to show the nature of the formations, was conflicting. The evidence tended to show that sand was thrown up originally in the form of a bar with lower swampy or marshy areas between the bar and the higher land to the south, and that there had been some artificial filling on this marshy land, as well as on the bar, but after the low land and bar had become useable and were being used as land and not as lake water. There was at times some shallow water, not necessarily lake water, be-

tween the bar and the higher land at the south, the exact location of which cannot be determined. The existence of this water is not inconsistent with the map made in 1829, showing a considerable swamp adjoining the Genesee River and extending down through Lots 25, 24, 23 and 22 (all south of Lots 20 and 21, which contain the locus in dispute), and a short distance into Lot 21, and showing also a small stream emptying into the swamp. The swamp appears to have been present before accretion began in substantial amount. Such artificial filling as was done was not earlier than 1884. A small structure known as the McIntyre Hotel was built on the property in question as far back as 1860; and a substantial building (the Spencer House) was erected in 1873 and destroyed by fire in 1882. As shown by photographs made at the time, the land, long prior to any artificial filling, had a substantial character, was built upon and contained a number of trees of considerable size which evidently had been growing for many years.

Test pits dug in the property in dispute indicated natural material (as distinguished from artificial fill) extending somewhat above the present lake level and above the estimated "mean level" (for a period of 85 years).

The exact character (that is whether natural or artificial) of the material found in the test pits, above that admittedly of natural formation, and the extent to which such contested material was above or below some estimated "ordinary high water mark" (also the subject of conflicting opinion) cannot be determined with any degree of accuracy, and the testimony on this subject does not affect or contradict the evidence that the premises in dispute existed as land, and were used as such, prior to the date of any artificial fill, or any occasion for such fill.

It appears therefore that at least since 1829 the edge of the lake has gradually advanced northward by natural accretion due to the filling in and building up of

the sands, by action of the winds and waters of the lake and inland streams, and the land cannot be said to have been formed by artificial filling in the bed of the lake.

CONCLUSIONS

I.

TITLE TO THE BED OF LAKE ONTARIO

The claim of Massachusetts to the parcel of land in the City of Rochester here in question, rests upon a cession to Massachusetts in the Treaty of Hartford made in 1786. In that treaty New York ceded to Massachusetts "the right of preemption of the soil from the native Indians" and all other the estate, right, title and property except the "right and title of government, sovereignty and jurisdiction," in a vast tract in the western part of the State of New York, which includes within its boundaries that part of the present City of Rochester on the lake front, where the parcel in dispute is located. The particular parcel, it is assumed, was not dry land at the time of the Treaty of Hartford, but has been built up from the bed of the lake either by natural accretion or artificial fill, or both. Aside from the claim to be later considered, that the land, if formed by accretion, belongs to Massachusetts as the alleged owner of the shore or strip of land between high and low water mark on Lake Ontario, there is the contention of the plaintiff that if the land was made by artificial fill, or came into being in such a way as that it would not belong to the riparian owner, then it belongs to Massachusetts as the owner of the bed of the lake from which the land has been built up.

The first question, therefore, is whether the Treaty of Hartford granted to Massachusetts any title to the soil under the waters of Lake Ontario.

The treaty of Hartford contains three principal clauses of cession: first, a grant by Massachusetts of certain rights

to New York; second, a grant by New York of certain specific property to Massachusetts; and, third, a release by Massachusetts to New York of all title of Massachuetts to the remaining property referred to in the instrument as in dispute.

The first clause grants to New York "all the claim, right and title which the Commonwealth of Massachusetts hath to the Government, Sovereignty and Jurisdiction" of all the lands in controversy between the States.

In the second clause the State of New York cedes, grants, releases and confirms to the Commonwealth of Massachusetts, her grantees and the heirs and assigns of such grantees "the Right of pre-emption of the Soil from the native Indians and all other the Estate Right Title and Property (the Right and Title of Government Sovereignty and Jurisdiction excepted) which the State of New York hath of in or to" 234,400 acres to be located by the Commonwealth and to be situated as described, and also "of in or to all the Lands and Territories within the following Limits and Bounds", set forth as follows: the south boundary as the north line of Pennsylvania from a point "82 miles west from the north east corner of Pennsylvania on Delaware River" to the western boundary of the State of New York, the eastern boundary a meridian from the first point, extending to "the boundary line between the United States of America and the King of Great Britain" in the middle of Lake Ontario; the western boundary approximately the present western boundary of the State of New York, and the northern boundary (and a small part of the western boundary) the international line between the United States and Canada, in the middle of Lake Ontario, thus including within the description a large part of the lake between the international line and the south shore.

The question is whether the grant to Massachusetts of the right of preemption of the soil and all other estate, right and title in the tract specifically described, (and in-

cluding within its boundaries part of Lake Ontario south of the international line) taken in connection with the express reservation to New York of the "right and title of government sovereignty and jurisdiction," in and to the same tract described, carried with it the title to that part of the bed of Lake Ontario embraced within the bounds.

In interpreting this treaty the intent of the parties must be the guide and the meaning to be attributed to the words of the grant must be that meaning which the words were understood to have at the time, and under the circumstances in which they were used, considering the nature and character of the grant.

Further, treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of the rights that may be claimed under it, and the other favorable to them, the latter is to be preferred. (*Asakura* v. *Seattle*, 265 U. S. 332, 342.) And as said by Chief Justice Marshall in 1820 (*Handley's Lessee* v. *Anthony*, 18 U. S. 374):

> ". . . In great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

At the time the Treaty of Hartford was made it was understood that each State as a sovereign held, in trust for the public, the right to the navigable waters and the soils under them. As expressed by the court in *Martin* v. *Waddell*, 16 Pet. 367, 410: "When the Revolution took place, the people of each State became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their

own common use, subject only to the rights since surrendered by the constitution to the general government."

Prior to the Treaty of Hartford there was a dispute between Massachusetts and New York as to the large territory dealt with in that treaty. Both States claimed title to the property and sovereignty over it. So far as the claim of sovereignty was concerned it must be understood to have been a claim of all that sovereignty implied, and this included the absolute right to all the navigable waters and the soils under them for the common use of the people. When, therefore, Massachusetts ceded to New York all that claim, right and title which the Commonwealth had to the "government sovereignty and jurisdiction" of all the land and all the territory without exception, there was a manifest intent to convey what sovereignty implied and that would be the right to the navigable waters and the navigable lakes and the soil beneath the waters. Was this grant taken away, or exception made to it, as to the part of Lake Ontario included in the bounds of the tract conveyed to Massachusetts? The conveyance of that tract expressly reserved to New York the right and title of government, sovereignty and jurisdiction. Here, again, the words must be taken to include what the title of government, sovereignty and jurisdiction signified and therefore the exception must imply a reservation of the right to the navigable lake and the soil underneath the water.

It is not a question of the power of New York to grant the right to the soil in the bed of the lake in a treaty between sovereign States, nor is it a question of the power of the two States to separate the sovereignty from the ownership of the soil, if they saw fit to do so; it is a question of interpretation—not of what they could do but of what they intended to do and therefore did, by the language used.

It follows from these considerations that the Treaty of Hartford is to be interpreted as granting to Massachusetts

the territory described except the right to the navigable lake and the soil beneath the water.

This interpretation is the natural one in view of the situation, the purposes apparent from the deed, and the object sought to be accomplished. The conveyancers plainly had in mind the cession to Massachusetts of a vast tract largely wilderness, but regarded as valuable, to be held by Massachusetts as proprietary owner but only for the purpose of realizing money from its sale, and to be sold so as ultimately to bring settlers who would be citizens under the jurisdiction and sovereignty of the State of New York. The property was to be sold and Massachusetts had the right to sell to private individuals. Plainly, it was not contemplated that such private individuals, citizens of New York, would get by grant from Massachusetts the right to the bed of Lake Ontario, cutting off part of the prerogative of New York as sovereign. The parties did not contemplate the soil under the waters of Lake Ontario as a part of the marketable lands which would be of value to Massachusetts in the division between the two States. They were thinking of the soil that could be sold, as shown by the very words used; they were thinking primarily of that land "the right of the pre-emption of the soil" of which could be obtained from the Indians. It does not appear that the Indians had, or claimed to have, any rights to the soil under Lake Ontario. This right of preemption of the soil from the Indians was primarily what was conveyed and the general words added: "and all other the estate, right, title and property" were carefully limited by excepting the right of government, sovereignty and jurisdiction.

Bearing in mind that the lands were given to Massachusetts for the purpose of sale to private individuals and settlers, there was no valuable object to be accomplished, nor consideration to be given, by granting Massachusetts the ownership of the bed of the lake without any government, sovereignty or jurisdiction over it. If any such ob-

ject could be conceived, in line with the general purpose of the transaction, it would be that ownership of the bed might in some way secure to Massachusetts and her citizens the right to use the waters of the lake. But this subject was particularly dealt with in the treaty, in Article VI, and the precise object sought was expressed, and that was that "citizens of the Commonwealth of Massachusetts shall at all times have and enjoy the same and equal rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie and the waters communicating from the one to the other . . . as shall from time to time be had and enjoyed by the Citizens of the State of New York."

The view, therefore, of the treaty, is that the specific description and boundary of the tract conveyed to Massachusetts, giving the northern line as in the middle of Lake Ontario but excepting sovereignty and jurisdiction, did not carry with it title to any part of the bed of the lake.

II.

TITLE TO THE SHORE OF LAKE ONTARIO

The next contention of Massachusetts is that, aside from any right to the bed of Lake Ontario, Massachusetts received by the Treaty of Hartford among other lands, the "shore" of Lake Ontario in the region around the present city of Rochester, and that she did not divest herself of this ownership by a conveyance of this region to Phelps and Gorham, because that conveyance did not bound the Phelps and Gorham tract by the international boundary in the middle of Lake Ontario nor by the lake, but by the "shore of the lake", and therefore did not convey the "shore" itself. It would follow from this, as is contended that Massachusetts, not having parted with the title to the "shore" and being still the owner of the "shore", would be entitled to any accretions by recession of the lake or by throwing up of the sand and adding to the land at the edge of the lake because such accretions would be ad-

ditions to the "shore" and belong to the owner of the "shore" as riparian proprietor. As a consequence, the lands in dispute in this case, if formed by accretions to the shore would, as claimed by Massachusetts, belong to that State.

The conveyance referred to by which Massachusetts sold to individuals her right to that part of the "western territory" which includes the present city of Rochester, is the statute of 1788, approved November 21, 1788 (which together with the resolution of 1787 constitutes the instrument of conveyance). It is entitled, "An Act for confirming to Nathaniel Gorham and Oliver Phelps, Esquires, a certain tract of land, pursuant to a contract made with them for that purpose." It describes the land as follows:

> "Beginning on the North Boundary Line of the State of Pensylvania, in the parrallel of forty two degrees north latitude at a point distant eighty two miles west from the north east corner of Pennsylvania on Deleware River as the said Boundary Line has been run and marked by the Commissioners of the States of New York and Pennsylvania respectively and from the said point or place of beginning running west upon the said Line to a meridian which will pass through that corner or point of Land made by the confluence of the Thanahasgwaicon creek, with the waters of the Genesee River, thence north along the said meridian to the Corner or point Last mentioned, thence Northwardly along the Waters of the said Genesee River to a point two miles north of Thanawageras Village, so called; thence running in a direction due west twelve miles; thence *running in a direction northwardly* so as to be twelve miles distant from the most westward Bounds of the said Genesee River *to the Shore of the Ontario Lake;* thence eastwardly along the Shores of the said Lake to a meridian which will pass through the first point or place of beginning aforementioned;

thence south along the said Meridian to the first point or place of beginning aforesaid, being such part of the whole Tract purchased by the Grantees as aforesaid as they have obtained a Release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging."

The contention is that because this conveyance used the expression "to the shore" and "along the shores", instead of "to the lake" and "along the lake" (which concededly would have carried to the water's edge), the narrow strip of land along the edge of Lake Ontario (being the land between the high point of the water of the lake as determined by the experience of years, and the low point so determined), was withheld and not conveyed and still belongs to Massachusetts.

Here again, the question is one of interpretation of the instrument so as to ascertain the intent of the parties. In ascertaining this intent it is helpful to consider the nature of the grant, and the consequence of the interpretation insisted on by Massachusetts. The territory conveyed was an enormous area containing more than two million acres and about 45 miles wide and 90 miles long, reaching across the State of New York from the lake to the Pennsylvania line. It bordered on the lake a distance of over forty miles. It is evident from documents on file that it was sold by Massachusetts for future development, and it is obvious that the use of the shore of Lake Ontario would be of extreme value to the future settlers for transportation, hunting and fishing, landing places, etc., and that access to the water would be essential to development. On the other hand, no benefit whatever to Massachusetts can be observed in the reservation to the Commonwealth, as proprietary owner, of some undefined strip of ground on this particular portion of Lake Ontario, cutting off the grantees of Massachusetts from access to the water. Is such intent to retain a strip of land along the shore of Lake Ontario, necessarily to be deduced from the language of the deed, because the words

"to the shore" instead of the words "to the lake" are used in the description? It seems clear that it is not.

The act confirming the conveyance to Phelps and Gorham was pursuant to an agreement of 1787 to convey to them *all* the property which Massachusetts had received from New York by the Treaty of Hartford, and further, it was pursuant to a deed from the Indians of their rights, made under supervision of the Commonwealth, and it was intended to be a grant of such part of the whole tract as had been purchased from the native Indians by Phelps and Gorham. It is so recited in the act itself. The original agreement of 1787 provided that the Commonwealth would grant to Nathaniel Gorham and Oliver Phelps "all the right, title and demand which the said Commonwealth had" in and to the said "western territory" by deed of cession from New York, and that "all such purchases" as the said Nathaniel Gorham and Oliver Phelps "shall make of the claims of the said Indians . . . shall be confirmed by this Commonwealth."

It is proper, therefore, to examine the purchase from the Indians, afterwards made by Phelps and Gorham, so as to see what it was that Massachusetts agreed would be confirmed and which was subsequently confirmed.

The deed from the Five Nations to Phelps and Gorham, made July 8, 1788, extinguished the Indian claims, within the limits and bounds defined in said deed, to "all that territory or Country of land lying within the State of New York, contained within & being parcel of the lands and territory, the right of preemption of the soil whereof from the native Indians, was ceded by the State of New York" to the Commonwealth of Massachusetts by the Treaty of Hartford. The description of the limits and bounds of the lands conveyed did contain, in language used to describe the northern end of the western boundary and the northern boundary, the words, "to the shore of the Ontario Lake, thence eastwardly along the shores of

said lake"; but the description contained the further provision, "together with all and singular the woods, houses, streams, rivers, ponds, *lakes,* upon, within, and *in any wise appertaining* to said territory."

In construing this Indian deed, the situation of the parties, and the nature of the transaction should be borne in mind. The precise right and title held by the Indians is not clear, but it was probably a right of occupancy (*Martin* v. *Waddell,* 16 Peters 367; *Johnson* v. *M'Intosh,* 8 Wheat. 543), and must have included land adjacent to the waters of Lake Ontario for transportation and hunting and fishing. It is not to be presumed, in the absence of clear language to that effect, that the Indians intended to reserve a narrow undefined strip between the upland and the water (which could only be ascertained by determination of high and low water through the ages) which they could not use, and which would be of no benefit to them, when they conveyed away the adjacent land. Such an interpretattion would lead to an absurdity. What appears much more clearly in the deed of the Indians is that they meant to convey all the right they had, whatever it might be, in the entire eastern part of the Hartford Treaty Cession, and when they referred to the shore of Ontario Lake, they meant the edge of the Lake, and when they referred to all lakes appertaining to the territory, they meant to include whatever rights they had in or on the borders of all the lakes, including Ontario, which was the only lake specifically mentioned in the deed. They did not mean to retain title to, and to be able to exclude others from some ribbon of land forty miles along the shore of Lake Ontario.

This deed of the Indians is the foundation of what Massachusetts meant to convey to Phelps and Gorham. It was the deed which Massachusetts had agreed in advance she would confirm; it was the deed which in express language Massachusetts specifically found was made under her authority, and it was of the character that she had agreed to confirm, and which she did expressly confirm, by stating that

her conveyance, made by the Act of November 21, 1788, was of *the same tract* secured from the Indians by Phelps and Gorham. The language of the description is, "being such part of the whole tract [defined in the agreement with Phelps and Gorham of 1787] purchased by the grantees as aforesaid as they have obtained a release of from the Natives."

It is true that the Act of 1788, confirming the conveyance to Phelps and Gorham, omitted the reference to ponds and lakes appertaining to the property, but this does not cut down the extent of the conveyance, for it is controlled by the description of the property as *the same tract* contained in the Indian deed.

The use of the words "to the shore" instead of the words "to the lake" in the act of 1788 is explainable by the fact that the conveyance from the Commonwealth meant to follow exactly the language used in the Indian deed (and the Indian deed *was* followed word for word with the unimportant correction of the words "bends of the Genesee" to "bounds of the Genesee"). The use of the word "shore" in the Indian deed, as describing the south edge of Lake Ontario is explainable by the fact that in the Treaty of Hartford itself, to which all later deeds referred, the words "shore" and "lake" were used synonymously, the choice being determined by convenience of expression. For example, the western boundary in the Treaty was described as running from the international line in the middle of Lake Ontario south "to the south shore of Lake Ontario" and thence continuing south "to Lake Erie." In each instance the edge of the lake was clearly intended and it was not meant to exclude the "shore".

Coming to the technical meaning, in conveyancing, of the words "to the shore", when applied to inland navigable waters, as the words must have been used and understood at the time of the Phelps and Gorham deed, it is even clearer that those words were meant to designate the edge of the

water, and were equivalent to the expression "to the lake". At that time the word "shore" as applied to the sea and arms of the sea and rivers in which the tide flowed, was a word with a meaning well defined and understood to designate the beach, which during a part of the day was under the water and another part of the day was uncovered, that is, the space between ordinary high tide and ordinary low tide. This was long ago explained in the leading case of *Storer* v. *Freeman*, 6 Mass. 435, where it was said: "Seashore must be understood to be the margin of the sea in its usual and ordinary state; thus, when the tide is out low water mark is the margin of the sea; when the sea is full the margin is high water mark. The seashore, therefore, is all the ground between ordinary high water mark and low water mark." And again, in *Child* v. *Starr*, 4 Hill. (N. Y.) 369, 475, it was said: "The shore of tide water is that portion of the land which is alternately covered by the water and left bare by the flux and reflux of the tide."

The line marking the bounds of the shore on tide water is a definite, fixed line, ascertainable any day by observation, and a line with a call to the "shore" of tide water can be accurately measured by the surveyor. And so, a description which runs a line "to the shore" of the sea or an arm of the sea, or other waters where the tide ebbs and flows, without other or more definite expression, carries only to the land edge of the flats over which the tide ebbs and flows, but not over the flats. (*Storer* v. *Freeman*, 6 Mass. 435.) It runs to the water's edge, it is true, but to the water at high tide and not to the water at low tide.

But this meaning of the word "shore", as designating the space between high water and low water, produced by the ebb and flow of the tide, has no such application when the reference is to bodies of fresh water where there is no ebb and flow of the tide. In the case of bodies of fresh water, such as inland rivers and the Great Lakes, there is no such thing as a definite ascertainable space along the edge of the water, the boundaries of which are marked each day

by the rise and fall of the water, and in the case of the Great Lakes it may take investigation and observation of half a century to determine what is high water and what is the low water. This distinction was known and understood many generations ago.

It was explained in *Child* v. *Starr*, 4 Hill (N. Y.) 369, 475, where it was said:

> "Properly speaking therefore a river in which the tide does not ebb and flow has no shores in the legal sense of the term";

and, the court added, when applied to such river the word "shores" would mean "those portions of the banks of the river which touch the margin or edge of the water of the stream".

It was also explained in *Halsey* v. *McCormick*, 13 N. Y. 296, 297, where it was stated, on authority of earlier cases, that the rule with reference to waters of the sea and its arms, where the tide ebbs and flows "depends upon a reason quite inapplicable to fresh water rivers".

> "All the citizens of the state have a right to resort to the sea for the purposes of fishing, and the like, therefore the space between the high and low water mark is held to be the property of the public, like a common highway; and even a grant from the sovereign will not be construed to include this space unless it is clearly and indisputably so expressed."

So a grant which is bounded by the shore of a body of fresh water does not stop at the edge of some indefinite and unascertainable strip of land between high water at some stage in the past or future, and low water at some stage in the past or future, but it goes to the water's edge, wherever that may be at any time. Unless there are words expressing a contrary intent, or unless the deed shows other definite monuments which control, it is proper to con-

strue a description of lands bordering on large fresh water lakes, which uses the language merely "to the shore" as meaning a line going to the water's edge.

Considering, then, the technical meaning of the words used it cannot be said that the expression "to the shore" of Lake Ontario had any different meaning than would the expression "to the edge of the water". And so of the expression "along the shore". There is nothing in the text of the instrument to indicate a contrary intent. It follows, therefore, that the words "to the shore" and "along the shore" must be construed, not as reserving a strip of ground between the supposed upland and the supposed low water of the lake, but as meaning the only line that could have been then ascertained (without the history of the water for generations) that is, the water line at the time.

That these words, "to the shore," were used by the conveyancers in the sense here indicated is confirmed by all the acts and deeds subsequently passed and executed by Massachusetts for the disposal of her "western territory". In the drawing of many of these later instruments some of the same commissioners who negotiated with Phelps and Gorham took part. In 1791, by Resolve of the House of Representatives of Massachusetts, David Cobb, William Eustis and Thomas Davis, were appointed a committee to sell to Samuel Ogden all the lands of the "western territory" not already sold to Phelps and Gorham. The lands so to be sold were described as bounded "westerly *on Lake Erie* and on land lately belonging to the United States, . . . southerly by the State of Pennsylvania, *easterly on land the property of Nathaniel Gorham and Oliver Phelps*" and their assigns, and "*northerly on Lake Ontario,*" a description which undoubtedly ran to the waters of the lake on the north and included the shore; and yet the whole eastern boundary and the only eastern boundary was the land of Phelps and Gorham. An amendment added by the Senate, substituted for the description the statement that

the lands to be conveyed were "all" the lands received from New York and not before conveyed to Phelps and Gorham and the United States. The committee executed an indenture dated March 12, 1791, in which the land to be deeded in pursuance of the authority of the Commonwealth, was described as all "that tract ceded by New York to Massachusetts" except the parts theretofore granted to the United States and the parts granted to Phhelps and Gorham, and the description by metes and bounds read:

> "Bounded westerly in part upon lands lately ceded by the United States . . . and in part by *Lake Erie* and so extending northerly . . . on the line of said tract (belonging to New York) *to the south shore of Lake Ontario,* then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States, & upon that line extending until a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps . . . and the said premises . . . are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania"

and on that line to the place of beginning.

It is thus seen that in the proceedings for this conveyance, Massachusetts used the expression "bounded by the Lake" and "to the shore of the lake", as convenience suggested, and yet it is evident that in each instance a boundary on the waters of the lake was meant. It is also seen that the expression to the "south *shore* of Lake Ontario" was used to describe the terminus of a line running from the south, north to Lake Ontario, and yet this expression evidently meant to carry the line *to the waters of the lake,*

for otherwise *there would have been a hiatus in the boundary*—an intent which is not to be presumed.

It is true that in this Ogden conveyance the northern boundary is the middle of Lake Ontario, and runs upon a line the end of which is at a point where "a meridian falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham and Oliver Phelps." But any inference from this language to the effect that the northwest corner of the Phelps and Gorham land was therefore considered to be at some point on the shore of the lake, south of the international boundary through which the meridian extended, is overcome by the failure to continue the line *along such meridian* so as to form the eastern boundary, and the specific requirement that the sole eastern boundary should be "the same tract confirmed to the said Gorham and Phelps". The language as to the eastern boundary starts an entirely new description, and reads as follows: "and the said premises to be bargained and sold aforesaid by virtue of the powers contained in the Resolve aforesaid are to extend adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania". But even if the use of the expression "a meridian falling from the same will strike the northwest corner" indicated that the Gorham and Phelps lands were somewhere south of the international boundary, it does not indicate that they were south of the shore of Lake Ontario, or south of the edge of the water.

And so in the Indian deed to Robert Morris made in 1797, in the presence and with the approval of William Shepard, represenative of Massachusetts, which was made (as recited in the Resolve of March 1804) with the authority of the Commonwealth of Massachusetts, the land conveyed to Morris was described as "all such part thereof (Hartford Treaty lands) as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham" and bounded "easterly by the land confirmed to Oliver

Phelps and Nathaniel Gorham" without any other description of the eastern boundary.

The conclusion is that the words "to the shore" and "along the shore", applied, as they were, to navigable waters where the tide does not ebb and flow, were used to designate the line where land and water meet and in no other sense. It follows therefore, that Massachusetts did in conveying to Phelps and Gorham convey to the water's edge and the successors in interest to Phelps and Gorham were riparian owners.

III.

PRACTICAL CONSTRUCTION OF GRANTS

The practical construction by the Commonwealth of Massachusetts and the State of New York, of the Treaty of Hartford and of the grants by Massachusetts to individuals immediately following, made by uniform and unquestioned acts from the outset, and continued for a period of a century and a quarter, supports the contention that Massachusetts did not reserve or retain the title to the bed of Lake Ontario, or to a strip of land between some high stage of Lake Ontario and some low stage of the lake.

Shortly after the conveyance to Phelps and Gorham in 1788, Massachusetts declared in unequivocal terms, in acts of her legislative body relating to the dispostion of the western territory and in subsequent contracts and conveyances for the grants of lands received from New York, that she had intended to and had conveyed away *all* she had ever received from New York.

In the original agreement with Phelps and Gorham, chapter 25, of April 1, 1788, Massachusetts proposed to sell the entire right acquired under the Treaty of Hartford. Phelps and Gorham obtained from the Indians, however, their rights in only a part of the territory, and consequently the deed from Massachusetts, finally made to Phelps and Gor-

ham, conveyed only such part as the grantees had obtained from the Indians. Subsequently Massachusetts undertook to convey away *all the balance*. In 1791, a resolution, passed by the House and amended by the Senate, appointed a committee with full power and authority to bargain and sell to Ogden "*all* and singular the right of preemption and *all other* the title and interest of this Commonwealth in and unto all that tract of land lying in the State of New York, the right of preemption whereof the State of New York ceded, granted, released and confirmed to this Commonwealth", saving and excepting the part conveyed to Phelps and Gorham, and a certain part previously granted to the United States. The committee so appointed, in its report recited the authority it had received to sell to Ogden, and stated that such authority had been executed and duly discharged. By resolve of 1791, passed June 17 (Chapter 65, Resolve 1791), the report of the committee was approved and the various deeds executed were directed to be recorded. In this approval the legislature recited that the committee had been appointed with authority to sell to Ogden all the right, title and interest which the Commonwealth had received from New York, and which had not been theretofore ceded or granted by Massachusetts. The language was "to sell and convey . . . the right of preemption, and *other the title and interest of the Commonwealth* to that part of the lands lying in the State of New York, the right of preemption whereof the said State of New York had ceded to this Commonwealth, and *which had not been by them before otherwise ceded or granted.*"

In 1797 Morris obtained from the Indians a grant of their rights to all such part of the land ceded by New York to Massachusetts "as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham." And in Chapter 155 of the Resolves of Massachusetts passed March 8, 1804, the treaty of Morris with the Indians is referred to as having been made with the authority of Massa-

chusetts, and to have extinguished the Indian rights in the lands referred to.

There does not appear to have been any official act or any expression of the General Court or the Legislature of Massachusetts, or of any official of the Commonwealth from the earliest times until the commencement of the present action, which suggests that Massachusetts had reserved or retained, or intended to reserve or retain any land under Lake Ontario, or along the edge of the Lake. So also the public authorities of New York, so far as the record shows, have continuously treated the property as other property in the state, and as not encumbered with a right or claim of the Commonwealth of Massachusetts. In the case of *Indiana* v. *Kentucky*, 136 U. S. 479, it was said:

> "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of Rhode Island *v.* Massachusetts, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the Colonies, said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary.' . . .

"And Wheaton, in his International Law, says: 'The writers on national law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question.'"

It is true that the Treaty of Hartford provided "That no adverse possession of the said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts"; but this, of course, does not affect the interpretation by Massachusetts (or the long continued acquiescence in an interpretation) of her own deeds and acts as conveyances of *all* the so-called "western territory" received from New York, leaving nothing remaining in Massachusetts.

IV.

THE ISSUE AS TO ACCRETIONS

The land in dispute in this case, forming the northern part of old lots 20 and 21 is located beyond and to the north of the lines of those lots as laid out by the Shepard survey, in 1803. The land in question, therefore, must have been formed by additions to the mainland since 1803. What the water line was in 1788 has not been shown, so that it cannot be positively stated that the locus was not part of the mainland in 1788, although it is not likely. It is fair to assume from the evidence that the parts of lots 20 and 21 in question were built up by action of the waters in throwing up sand, accelerated and greatly increased by the construction of two

piers or jetties built in the 30's by the United States Government to improve navigation of the Genesee River and aided by deposits of sand and mud from the Genesee River and other inland streams. The Government piers caused the deposit of material which accounts in a large measure at least, for the additional land added to lots 20 and 21. There is some suggestion in the record that part of the land between the Lake and the original north lines of lots 20 and 21 was artificially filled but it is not shown that the filling was done on the bed of the lake, nor that it excluded lake water. The evidence indicates that the fill was made on low, marshy land, but it was on land that had become susceptible of use as such and was not disconnected from the slightly higher land clearly formed by the action of the waters further north. Besides, such artificial fill as was indicated, was made as late as 1884, and it is apparent that the land already formed, was substantial, and was used and occupied with large structures long before 1884. It is evident, therefore, that the land here in question was formed by natural accretion since 1803.

The defendants claim this accretion as the owners of the parts of lots 20 and 21 adjoining the water. The Commonwealth of Massachusetts contends that the land of the defendants bounds on the "shore", which is assumed to be the space between some stage of the waters of the Lake when they were low, and some stage of the waters when they were high, and therefore, the accretions belong to Massachusets as the owner of the "shore".

It is a well settled rule that where land encroaches upon water by alluvion, by the washing up of the earth, or by recession of the waters, the accretions belong to the owner of the land bounded on the water; and this is true whether or not the accretions have been caused or stimulated by the construction of piers or other artificial structures by public authorities, (*Jones* v. *Johnson*, 18 Howard 150; *St. Claire Co.* v. *Lovington*, 23 Wall. 6). And this rule is applicable

to Lake Ontario (Opinion Attorney General Cushing, 7 Opp. Atty. Gen. 314 and cases cited).

Whatever may be the rule as to accretions to the shore, applying to land adjoining the sea or arms of the sea and other tidal waters where there is a well-defined, asertainable strip of land marked each day by the high tide and the low tide, this rule is not to be applied to bodies of fresh water where there is no high tide or low tide, and no difference ascertainable at any given time between so-called high water and so-called low water, and where the high water and low water can be found only by an investigation extending through years or generations. In the case of the sea and arms of the sea, the word "shore" has a meaning well understood; if applied to non-navigable rivers and the Great Lakes, this is not true. Accordingly, it seems the better rule, that a conveyance of land which goes "to the shore" or "along the shore" of a navigable fresh water lake (without any expression of contrary intent) conveys to the water and makes the grantee a riparian owner. It is believed that such rule is in consonance with the decisions in New York (*Child* v. *Starr*, 4 Hill 369; *Halsey* v. *McCormick*, 13 N. Y. 296; *Stewart* v. *Turney*, 237 N. Y. 117).

It follows from these considerations that whether the land here in question was formed by artificial fill or natural accretion, it would not belong to the plaintiff. If formed by artificial fill on the bed of the lake, it would not belong to Massachusetts because the title to the bed of the lake was not in Massachusetts; if formed by natural accretion, it would not belong to Massachusetts because that State had not, when the accretions began, any title to the shore lands abutting on the water.

V.

The conclusion, therefore, is that the plaintiff has no title to the parcel of land claimed and described in the bill of complaint.

Wade H Ellis
Special Master

Stipulated Transcript of Record

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 14, Original

THE COMMONWEALTH OF MASSACHUSETTS,
COMPLAINANT,

vs.

THE STATE OF NEW YORK ET AL.

BILL IN EQUITY

FILED MAY 12, 1922

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 14, Original

THE COMMONWEALTH OF MASSACHUSETTS
COMPLAINANT,

vs.

THE STATE OF NEW YORK ET AL.

BILL IN EQUITY

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No. —, Original

COMMONWEALTH OF MASSACHUSETTS, Plaintiff,

v.

THE STATE OF NEW YORK; THE CITY OF ROCHESTER; JAMES L. Hotchkiss, Clerk of the County of Monroe, State of New York; Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan as Commissioners of Appraisal; the New York Central Railroad Company; Ontario Beach Hotel & Amusement Company; Central Union Trust Company of New York; the Upton Company; Anna T. Granger; Emil Boshart; Rebecca Boshart; Bartholomay Brewing Company; Milton J. McIntyre; Belle McIntyre; Twentieth Ward Co-operative Savings & Loan Association and the Farmers Loan & Trust Company, Defendants.

ORIGINAL BILL OF COMPLAINT—Filed May 12, 1922

To the Honorable the Justices of the Supreme Court of the United States:

I

The plaintiff, the Commonwealth of Massachusetts, one of the [fol. 3] States of the United States of America, brings this its bill of complaint in equity against the following defendants:

The State of New York, one of the States of the United States of America.

The City of Rochester, a municipal corporation created by the laws of the State of New York and by virtue of the laws of the State of New York a citizen of said State, and the territorial limits of said defendant, the City of Rochester, are wholly within the said State of New York and the County of Monroe.

James L. Hotchkiss, Clerk of the County of Monroe, State of New York, and by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of said City of Rochester, County of Monroe and State of New York.

Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal appointed by an order of the Supreme Court of the State of New York upon the application of the said City of Rochester, heretofore made to said Supreme Court of the State of New York, for an order appointing Commissioners of Appraisal for the purpose of determining the amount of the compensation which the owners, tenants or occupants of the lands hereinafter described and the buildings thereon and the rights and easements therein, are entitled to receive for the same. The said defendants,

Eugne Van Voorhis, John A. Vanderwerf and Charles C. Beahan, are all citizens of said State of New York and are all residents of the said City of Rochester, State of New York.

The New York Central Railroad Company, a corporation organized [fol. 4] and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in the City of New York in said State of New York.

Ontario Beach Hotel & Amusement Company, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in the said City of Rochester, State of New York.

Central Union Trust Company of New York, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in the said City of New York, State of New York.

The Upton Company, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in the said City of Rochester, State of New York.

Anna T. Granger, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of the said State of New York and a resident of the Township of South Bristol in the County of Ontario in the said State of New York.

Emil Boshart, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of said City of Rochester, State of New York.

Rebecca Boshart, by virtue of the laws of the State of New York [fol. 5] a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of said City of Rochester, State of New York.

Bartholomay Brewing Company, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in the said City of Rochester, State of New York.

Milton J. McIntyre, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of said City of Rochester, State of New York.

Belle McIntyre, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of the City of Rochester, State of New York.

Twentieth Ward Co-Operative Savings & Loan Association, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State

of New York a citizen of said State, with its office and principal place of business in the said City of Rochester, State of New York.

The Farmers Loan & Trust Company, a corporation organized and existing under and by virtue of the laws of the State of New York and by virtue of the laws of said State of New York a citizen of said State, with its office and principal place of business in said City of New York, State of New York.

[fol. 6] II

And for its cause of action, the plaintiff complains and says as follows:

This suit is founded upon a controversy between a state and another state and the citizens thereof. The plaintiff claims title to a tract of land in the defendant State of New York. The defendant City of Rochester has attempted to take said tract in the exercise of the power of eminent domain and has instituted condemnation proceedings in the courts of said State of New York, joining as parties thereto certain of the defendants herein claiming title to said tract. The plaintiff has appeared specially but not generally in said proceedings, was not made a party and is not a party thereto. The plaintiff has brought an action of ejectment in this court against the defendant City of Rochester, a citizen of said State of New York. This suit is brought to restrain the defendants from proceeding further with the said condemnation proceedings in the attempted exercise of the power of eminent domain over said tract; to remove clouds upon the plaintiff's title; to restrain other acts which may constitute a cloud upon the plaintiff's title thereto; to restrain the defendants from taking any action elsewhere than in this court which may affect the plaintiff's title and right of possession to said tract; and to establish the plaintiff's title and right in said tract or its right to receive adequate compensation therefor.

[fol. 7] III. Part A

The plaintiff states that on the 3d day of November, 1620, James I, King of England, Scotland, France and Ireland, granted to the council established at Plymouth all that part of America lying and being in breadth from 40° of north latitude through the equinoctial line to the 48th° of the said northerly latitude, inclusively, and in length of and within all the breadth aforesaid throughout all the main lands from sea to sea.

That William and Mary, King and Queen of England, Scotland, France and Ireland, on the 7th day of October, 1691, granted to the Province of Massachusetts Bay in New England the land in America extending on the Atlantic Ocean from north latitude 42° 2′ to 44° 15′ and from the Atlantic to the Pacific Ocean.

That Charles I, King of Great Britain, in 1663 granted to the Duke of York and Albany the province of New York, and the land conveyed by this grant extended from a line 20 miles east of the

Hudson River westward and from the Atlantic Ocean northerly to the south line of Canada, then a French province. These grants extended westerly indefinitely, and in the western part of the State of New York overlapped, so that later, when the Commonwealth of Massachusetts succeeded to the title, sovereignty and jurisdiction of the lands formerly of the Massachusetts Bay and Plymouth Colonies, and the State of New York succeeded to the title, sovereignty and jurisdiction of the lands granted to the Duke of York and Albany, a dispute arose between the two states over a large part of the land now forming the State of New York, including western New York [fol. 8] at the locus involved in this action.

That on account of the collision of description of the above-mentioned grants the Commonwealth of Massachusetts and the State of New York laid claim to the jurisdiction, sovereignty and to the pre-emptive right of the same land. The controversy was submitted to commissioners appointed by the two states.

That the commissioners so appointed met at Hartford in the State of Connecticut on the 16th day of December, 1786, and settled their differences through the execution of a treaty known as the Hartford Treaty.

That the State of New York, by the terms of said treaty, did cede, grant, release and confirm to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York had within the following limits and bounds: beginning in the north boundary line of the State of Pennsylvania, in the parallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of Pennsylvania, on Delaware River, as the said boundary-line hath been run and marked by the Commissioners appointed by the States of Pennsylvania and New York respectively, and from the said point or place of beginning, running on a due meridian north to the boundary line between the United States of America and the King of Great Britain; thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the streight or waters between [fol. 9] Lake Ontario and Lake Erie; thence south along the said meridian, to the south shore of Lake Ontario; thence on the eastern side of the said streight, by a line always one mile distant from and parallel to the said streight, to Lake Erie; thence due west to the boundary line between the United States and the King of Great Britain; thence along the said boundary line, until it meets with the line of cession from the State of New York to the United States; thence along the said line of cession, to the northwest corner of the State of Pennsylvania; and thence east along the northern boundary line of the State of Pennsylvania to the said place of beginning.

That the terms of the treaty provided, in the seventh clause thereof, that no adverse possession of the said lands for any length

of time shall be adjudged a disseisin of the Commonwealth of Massachusetts.

That by the terms of the said Hartford Treaty the State of New York did convey to the Commonwealth of Massachusetts all of the upland and lands under water within the boundaries described above, including the title to the land under the waters of Lake Ontario.

That the Treaty of Hartford is now on file in the archives division of the Department of the Secretary of the Commonwealth of Massachusetts and is also duly recorded in the office of the Secretary of the Commonwealth of Massachusetts in Volume I. Treaties and Contracts, page 83, and is also duly recorded in the office of the Secretary of State of the State of New York in Liber 22 of Deeds at page 38.

That by the said recording of said Hartford Treaty in said offices of the Secretary of the Commonwealth of Massachusetts and of the Secretary of State of said State of New York, due, timely and [fol. 10] lawful notice was given to all persons of the interest acquired by the plaintiff, the Commonwealth of Massachusetts, in and to the lands described in said Hartford Treaty.

That included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty were certain lands situated in the city of Rochester, County of Monroe, and State of New York and bounded and described as follows:

Beginning at a point in the north line of Beach Avenue and where the said north line intersects the west line of the west United States Government Pier; thence (1) westerly along the north line of Beach Avenue about one thousand six hundred eighty-five and five-tenths (1,685.5) feet to a point; thence (2) northerly along the west line of lands formerly occupied by the Bartholomay Brewing Company, about three hundred and eighteen (318) feet to low water mark of Lake Ontario; thence (3) easterly along said low water mark of Lake Ontario about one thousand seven hundred and forty-five (1,745) feet to the west line of the said United States Government Pier; thence (4) southerly along the west line of said Pier about six hundred and forty-two (642) feet to the place of beginning.

That the plaintiff, the Commonwealth of Massachusets, has never divested itself of its title to the parcel of land bounded and described in the preceding paragraph, and is the owner and is in possession of said parcel.

[fol. 11] III. Part B

And the plaintiff further complains and says that the said defendant the City of Rochester was created as hereinbefore stated, and exists by virtue of the laws of the said State of New York, to-wit: by virtue of Chapter 755 of the Laws of 1907 and known as the Charter of said defendant, the City of Rochester.

That section 2 of said Charter empowers said defendant the City of Rochester to acquire real estate within and without the limits of said City of Rochester.

That section 436 of said Charter provides that—

"Wherever the common council has passed an ordinance for the purchase of real estate, rights or easements, and the commissioner of public works reports that he is unable to acquire such real estate, rights or easements, * * * the corporation counsel must cause to be filed in the office of the city clerk and the county clerk of the county in which the real estate, rights or easements are situate, a copy of the ordinance and a map of the real estate, rights or easements sought to be taken."

"§437. Application for Appointment of Commissioners.—The corporation counsel must, after the filing of the map, cause to be published for ten days in one of the official papers, a notice specifying the real estate or rights or easements therein to be acquired, and stating that an application will be made to the county court of the county of Monroe, or to the supreme court, at a special term thereof held in the judicial district in which the real estate, rights or easements sought to be taken are situate, at a time specified in the notice, for the appointment of commissioners to ascertain and determine the compensation which ought justly to be made by the city to the owners of the real estate, rights or easements sought to be taken, and to persons having any estate, interest or easement therein or any [fol. 12] lien, charge or incumbrance thereon. The corporation counsel must also, at least ten days before the time named for such application, cause a notice to be served on each of the owners of the real estate or rights or easements therein sought to be taken, and upon each person having any estate, interest or easement therein or any lien, charge or incumbrance thereon, either personally or by leaving the same at their several places of residence, and in case no person can be found at the time of making the service at such place of residence, then such notice may be served by posting the same in a conspicuous place at such place of residence; if any person to be served is a non-resident of the state, the notice may be served by mailing it to him at his last known place of residence; and in case the residence of any person to be served cannot be ascertained, the notice be served by leaving the same at the residence of the occupant of the premises sought to be taken, and if there is no occupant, by posting the same in a conspicuous place upon the premises sought to be taken."

"§438. Appointment of Commissioners.—At the time in such notice specified, or the time to which the application may be adjourned, the court, upon filing proof by affidavit of the publication and service of such notice, and upon hearing the city and all persons interested who appear, may appoint three commissioners of appraisal not interested in any of the real estate, rights or easements sought to be taken nor of kin to any owner thereof or to any person having any estate, right or interest therein or lien, charge or incumbrance thereon."

"§439. Condemnation Proceedings Not Affected by Subsequent Transfers.—When condemnation proceedings herein authorized have been commenced by the filing of the ordinance and map, no change of ownership thereafter by conveyance or other transfer, of the real estate, or right or easement, or of any interest therein, or of the subject-matter of the appraisal, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made."

[fol. 13] "§440. Oath of Commissioners.—The commissioners appointed must take and subscribe the constitutional oath of office."

"§441. Hearings Before Commission.—Any of the commissioners may issue subpœnas and administer oaths to witnesses. One of them may adjourn the proceedings from time to time. They must give notice by publication in one of the official papers for at least ten days of the time and place where their first meeting is to be held. At the time appointed, or at any other time or times to which they may adjourn, they must proceed to view the real estate, rights or easements sought to be taken and hear the proofs and allegations of the parties. After the testimony is closed they must determine the compensation which ought justly to be made by the city to the respective owners of the real estate, rights or easements sought to be taken, and of the respective persons having any estate, interest or easement therein or any lien, charge or incumbrance thereon."

"§442. Report of Commissioners.—The commissioners must, as soon as convenient, make their report, signed by a majority of them, in which they must describe with all practical certainty the several parcels of real estate or rights or easements sought to be taken, and the names, residences and title or rights, as far as can be ascertained, of the respective owners thereof, and of the respective persons having any estate, interest or easement therein, or any lien, charge or incumbrance thereon and the amount of compensation which ought justly to be made by the city to the respective owners of the real estate, rights or easements sought to be taken and to the respective persons having any estate, interest or easement therein or any lien, charge or incumbrance thereon."

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"§444. Confirmation of Report.—Fifteen days after the report is recorded in the office of the clerk of the county in which the real estate, rights or easements sought to be taken are situate, such report becomes confirmed."

[fol. 14] "§445. Possession of Property and Giving Security.—At any stage of the proceeding the court may authorize the city, if in possession of the real estate, rights or easements sought to be taken, to continue in possession thereof, and may stay all actions or proceedings against it on account thereof, or, if the city is not in possession, may authorize the city to take immediate possession of the

real estate, rights or easements sought to be taken; upon giving such security or depositing such sum of money as the court may direct, to be held as security for the payment of the compensation which may be finally awarded. In case possession is retained or taken under this section, the condemnation proceedings cannot thereafter be abandoned."

* * * * * * *

"§448. Conflicting Claims.—If there are adverse and conflicting claimants to the money or any part of it to be paid as compensation for the real estate, rights or easements sought to be taken, the court may direct the money to be paid into court by the city, and may determine who is entitled to the same and direct to whom the same shall be paid, and may in its discretion order a reference to ascertain the facts on which such determination and direction are to be made."

"§449. Award to Unknown Owners.—If an award is made to any unknown person, the court may direct that the sum so awarded be paid into court to await its disposition."

"§450. Award to Non-resident Owners.—If an award is made to any non-resident or any person whose residence or place of domicile cannot be located, or if for any reason the city is unable to pay to any person the moneys awarded to him, the court may direct that such moneys be paid into court to await its disposition."

* * * * * * *

"§452. When Title Vests in City.—Upon the payment of the sum awarded the city becomes vested with the title to the real estate, rights or easements taken, free from any and all liens, charges or incumbrances of every kind and nature."

[fol. 15] III. Part C

And the plaintiff further complains and says that on or about the 25th day of February, 1919, and in accordance with the provisions of said Charter of the said City of Rochester, the Common Council of said defendant City of Rochester duly adopted an ordinance, which ordinance was thereafter duly approved by the Mayor of said City of Rochester, and is now in full force and effect, for the acquisition of certain lands for park and other municipal purposes, of a part of said lands of said plaintiff, the Commonwealth of Massachusetts, hereinbefore described.

That on or about the 13th day of May, 1919, and in accordance with the provisions of said Charter of the said City of Rochester, the Common Council of said defendant City of Rochester duly adopted an ordinance, which ordinance was thereafter duly approved by the Mayor of said City of Rochester and is now in full force and effect, for the acquisition of certain lands for park and other municipal pur-

poses, of another part of said lands of said plaintiff, the Commonwealth of Massachusetts, hereinbefore described.

That on or about the 10th day of February, 1920, and in accordance with the provisions of said Charter of the said City of Rochester, the Common Council of said defendant City of Rochester duly adopted an ordinance, which ordinance was thereafter duly approved by the Mayor of said City of Rochester and is now in full force and effect, for the acquisition of certain lands for park and other municipal purposes, of the remaining part of said lands of [fol. 16] said plaintiff, the Commonwealth of Massachusetts, hereinbefore described.

That said ordinances each provided and directed that the Commissioner of Public Works of said defendant City of Rochester purchase said lands at a price approved by the Board of Estimate and Apportionment of said defendant City of Rochester, and in case the said Commissioner of Public Works should be unable to purchase said lands, then and in that event the Corporation Counsel of the said defendant City of Rochester was by said ordinance directed to institute condemnation proceedings for the acquisition of said lands. That a copy of each of said ordinances, together with maps showing thereon the lands described in said ordinances, was filed in the said office of the clerk of the County of Monroe, State of New York, on the 13th day of April, 1920.

That on said 13th day of April, 1920, the said Corporation Counsel of said defendant City of Rochester in accordance with the provisions of said Charter of the said defendant City of Rochester and the said ordinances and on the report of said Commissioner of Public Works of the said defendant City of Rochester that he had been unable to purchase said real estate, rights and easements described in said ordinances from the owners thereof, at a price approved by the Board of Estimate and Apportionment of said defendant City of Rochester, and upon proof by affidavit of the filing of copies of said ordinances and map as aforesaid in the office of the clerk of the County of Monroe, instituted condemnation proceedings in accordance with the provisions of said Charter of the City of Rochester, which proceed- [fol. 17] ings were entitled as follows: In the Matter of the Application of The City of Rochester to Acquire Certain Lands for Park and other Municipal Purposes in the Twenty-third Ward in said City. That thereafter such proceedings were had in accordance with the provisions of said Charter of the City of Rochester.

That on the 26th day of April, 1920, the said Supreme Court entered an order authorizing the said City of Rochester to take immediate possession of the real estate, rights and easements sought to be taken, and that the City of Rochester thereafter took possession of the real estate, rights and easements in the said lands hereinbefore described.

That on the 26th day of April, 1920, an order was granted and entered in the above-entitled proceedings appointing Charles Van Voorhis, Edgar M. Curtice and John A. Vanderwerf Commissioners of Appraisal and granting said Commissioners power and authority in the manner provided for in said Charter of said defendant City

of Rochester to ascertain and report the amount of compensation which the owners, tenants or occupants of the lands described in said ordinances and the buildings thereon and the rights and easements therein to be taken for said municipal purposes, will be entitled to receive for the same. That said Commissioners of Appraisal accepted said appointment, took and subscribed the oath of office and proceeded to publish notice of first meeting of said Commissioners and thereafter proceeded to view the real estate, rights and easements sought to be taken in said proceeding, and to hear proofs and allegations of the parties. That thereafter the said Edgar M. Curtice died and the said defendant Charles C. Beahan was duly [fol. 18] appointed Commissioner in place and stead of said Edgar M. Curtice, deceased. That thereafter said Commissioner Charles Van Voorhis resigned from said Commission and the said defendant Eugene Van Voorhis was duly appointed in place and stead of Charles Van Voorhis, resigned. That said Commissioners of Appraisal are now engaged in hearing proofs and allegations of the said parties and are about to make and file their report as provided for by the said Charter of the said defendant City of Rochester.

That said plaintiff, the Commonwealth of Massachusetts, was not made and is not a party to said proceeding. That said plaintiff, the Commonwealth of Massachusetts, has notified said Commissioners that they are without power to adjudicate the interests of the Commonwealth of Massachusetts in and to the property hereinbefore described and described in said ordinances and sought to be acquired by the said defendant City of Rochester in said proceedings in the Supreme Court of the State of New York.

The plaintiff further says, upon information and belief, that the said Eugene Van Voorhis, J. A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal, are about to appraise the damage and compensation which the owners, tenants or occupants of the lands and buildings taken have sustained by being deprived thereof and the amount of compensation which they shall severally receive therefor, and are about to report that the same should be paid to parties other than the rightful owner of the lands, to wit: your plaintiff.

[fol. 19] III. Part D

And the plaintiff further complains and says that the said defendant, The New York Central Railroad Company, is a corporation heretofore formed by the consolidation of several Railroad Companies, among which is the corporation heretofore known as the New York Central and Hudson River Railroad Company, and said The New York Central Railroad Company is now the owner of all the property formerly owned by the said New York Central and Hudson River Railroad Company. That on the 31st day of May, 1881, one Patrick Manrow and Mary Manrow, his wife, executed and delivered to said New York Central and Hudson River Railroad Company a warranty deed, in writing, purporting to convey, with other real property, a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the 1st day of

June, 1881, in Liber 341 of Deeds at page 347, in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, created an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That the said defendant Central Union Trust Company of New York is a corporation heretofore formed by the consolidation of the Central Trust Company of New York and the Union Trust Company of New York, and the said defendant Central Union Trust Company of New York has succeeded to and acquired and now owns all the property of the said Central Trust Company of New York. [fol. 20] That on the 1st day of June, 1897, the said New York Central and Hudson River Railroad Company executed and delivered a mortgage, in writing, to said Central Trust Company of New York purporting to convey, with other real property, a portion of the real property of said plaintiff hereinbefore described. That said mortgage was recorded on the 14th day of July, 1897, in Liber 414 of Mortgages at page 81, in the office of the clerk of the County of Monroe, State of New York. That said mortgage remains undischarged of record. That said mortgage so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make said real property unmarketable.

That on the 1st day of October, 1883, the said New York Central and Hudson River Railroad Company executed, and on the 29th day of October, 1883, delivered, to one Henry H. Graig and Eli M. Upton a lease in writing, purporting to convey, with other real property, for a term of fifty years from the 1st day of October, 1883, to the 1st day of October, 1933, a portion of the real property of said plaintiff hereinbefore described. That said lease was recorded on the 27th day of December, 1884, in Liber 389 of Deeds at page 374 in the office of the Clerk of the county of Monroe, State of New York. That said lease was thereafter duly assigned by several mesne assignments and became the property of the said defendant Ontario Beach Hotel & Amusement Company by an assignment to it by one Charles H. Palmer, which said assignment was executed on the [fol. 21] 24th day of April, 1906, acknowledged on the 26th day of April, 1906, and recorded on the 11th day of May, 1906, in Liber 735 of Deeds at page 21, in the office of the clerk of the County of Monroe and State of New York. That said lease so executed, delivered, recorded and assigned, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable. That on the 25th day of February, 1908, one Homer E. A. Dick, referee named and appointed by the Monroe County Court, State of New York, in a judgment of said Court taken in

an action therein to foreclose a mechanics lien, in which action the said defendant The Upton Company was plaintiff and the said defendant Ontario Beach Hotel & Amusement Company and others were defendants, executed and delivered to said The Upton Company a referee's deed, in writing, purporting to convey a portion of the real property of said plaintiff hereinbefore described. That said referee's deed was recorded on the 29th day of February, 1908, in Liber 765 of Deeds at page 27, in the office of the clerk of the County of Monroe, State of New York. That said referee's deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said property unmarketable.

That on or about the 14th day of January, 1817, one William Sheldon as sheriff of Genesee County executed and delivered to one [fol. 22] Gideon Granger a sheriff's deed in writing, purporting to convey the real property of said plaintiff hereinbefore described. That said sheriff's deed was recorded in Liber 3 of Deeds at page 163 of Genesee County deeds, said real property of the plaintiff being situate in what was then a part of Genesee County, State of New York, since made by an act of the Legislature a part of Monroe County, New York, which said Liber 3 of Genesee County deeds, or a copy thereof, is now in the office of the clerk of the County of Monroe, State of New York. The plaintiff, the Commonwealth of Massachusetts, is informed and believes and, therefore, says that the said defendant Anna T. Granger is by virtue of the numerous grants, devises and bequests the sole successor in interest of said Gideon Granger, so conveyed by the said William Sheldon as sheriff. That said sheriff's deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, and tends to make the said real property unmarketable.

That on or about the 25th day of April, 1916, the said defendant, The New York Central Railroad Company, executed and delivered to said defendant Emil Boshart a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the 8th day of May, 1916, in Liber 990 of Deeds at page 402 in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said [fol. 23] property hereinbefore described, and tends to make the said real property unmarketable. That the defendant Rebecca Boshart is the wife of said defendant Emil Boshart.

That on or about the 29th day of April, 1912, the defendant Emil Boshart and one Arthur T. Tischbein executed and delivered to said defendant Rebecca Boshart a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore

described. That said deed was recorded on the 30th day of April, 1912, in Liber 874 of Deeds at page 186 in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 23rd day of April, 1917, the said defendant Rebecca Boshart executed and delivered to said defendant Twentieth Ward Co-Operative Savings & Loan Association a mortgage, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said mortgage was acknowledged on the 24th day of April, 1917, and recorded on the 25th day of April, 1917, in Liber 716 of Mortgages at page 287, in the office of the clerk of the County of Monroe, State of New York. That said mortgage remains undischarged of record. That said mortgage so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of the said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real [fol. 24] property unmarketable.

That on or about the 29th day of May, 1889, one Edward Harris and Emma Louisa Harris, his wife, executed and delivered to the said defendant Bartholomay Brewing Company a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on said 29th day of May, 1889, in Liber 450 of Deeds at page 331, in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 17th day of April, 1915, the said defendant The New York Central Railroad Company executed and delivered to said Bartholomay Brewing Company a deed, in writing, purporting to convey, with other property, a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the 30th day of August, 1915, in Liber 968 of Deeds at page 246, in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 17th day of August, 1915, New York State [fol. 25] Realty and Terminal Company executed and delivered to said defendant Bartholomay Brewing Company a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the

30th day of August, 1915, in Liber 968 of Deeds at page 248, in the office of the clerk of the County of Monroe, State of New York. Said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 27th day of April, 1888, one Martha McIntyre executed and delivered to the said defendant Milton J. McIntyre a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the 11th day of June, 1888, in Liber 472 of Deeds at page 256, in the office of the clerk of the County of Monroe, State of New York. That said deed so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable. That the defendant Belle McIntyre is the wife of the defendant Milton J. McIntyre.

That on or about the 16th day of April, 1913, the said New York Central & Hudson River Railroad Company executed and delivered to said Central Trust Company of New York a supplemental mort-[fol. 26] gage and agreement, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said supplemental mortgage and agreement was recorded on the 28th day of February, 1914, in Liber 643 of Mortgages at page 1, in the office of the clerk of the County of Monroe, State of New York. That said supplemental mortgage and agreement so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinafter described, and tends to make the said real property unmarketable. That said New York Central & Hudson River Railroad Company has heretofore been merged in the corporation know as The New York Central Railroad Company, one of the defendants herein, and th said defendant The New York Central Railroad Company is now the owner of all the property formerly owned by said New York Central & Hudson River Railroad Company. That the said Central Trust Company of New York has heretofore been merged in the corporation known as Union Trust Company of New York, one of the defendants herein, and the said defendant Central Union Trust Company of New York is now the owner of all the property formerly owned by said Central Trust Company of New York.

That on or about the 31st day of January, 1888, one Cyrus Gatewood executed and delivered to Windsor Beach & Ontario Railroad Company a deed, in writing, purporting to convey a part of the real property of said plaintiff hereinbefore described. That said deed was recorded on the 21st day of February, 1888, in Liber 435 of Deeds at page 8, in the office of the clerk of the County of Monroe. [fol. 27] That said deed so executed, delivered and recorded, being

not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 20th day of February, 1888, the said Windsor Beach & Ontario Railroad Company executed and delivered to Rome, Watertown & Ogdensburg Terminal Railroad Company a lease, in writing, purporting to convey according to the conditions and terms of said lease, a part of the real property of said plaintiff hereinbefore described. That said lease was recorded on the 21st day of February, 1888, in Liber 435 of Deeds at page 10, in the office of the clerk of the County of Monroe, State of New York. That said lease so executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make the said real property unmarketable.

That on or about the 15th day of March, 1888, the said Rome, Watertown & Ogdensburg Terminal Railroad Company executed and delivered to The Rome, Watertown & Ogdensburg Railroad Company a lease, in writing, of all of the property of said Rome, Watertown & Ogdensburg Terminal Railroad Company, said lease purporting to convey a part of the real property of said plaintiff hereinbefore described. That said lease was recorded on the 23rd day of March, 1888, in Liber 437 of Deeds at page 55, in the office of the clerk of the County of Monroe, State of New York. That said lease so [fol. 28] executed, delivered and recorded, being not void on its face, creates an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, and tends to make said real property unmarketable. That said Windsor Beach & Ontario Railroad Company, the said Rome, Watertown & Ogdensburg Terminal Railroad Company and the said The Rome, Watertown & Ogdensburg Railroad Company have heretofore been merged in the corporation known as The New York Central Railroad Company, one of the defendants herein, and the said defendant The New York Central Railroad Company is now the owner of all the property formerly owned by the said Windsor Beach & Ontario Railroad Company, the said Rome, Watertown & Ogdensburg Terminal Railroad Company and the said The Rome, Watertown & Ogdensburg Railroad Company.

That on or about the 1st day of July, 1874, the said The Rome, Watertown & Ogdensburg Railroad Company executed and delivered a mortgage, in writing, to the said defendant The Farmers Loan & Trust Company, purporting to convey, with other real property, a portion of the real property of said plaintiff hereinbefore described. That said mortgage was recorded on the 23rd day of July, 1874, in Liber 186 of Mortgages at page 1, in the office of the clerk of the County of Monroe, State of New York That said mortgage remains undischarged of record. That said mortgage so executed, delivered and recorded, being not void on its face, creates an apparent defect

in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, to the said real property hereinbefore described, [fol. 29] and tends to make said real property unmarketable.

That the ordinances, adopted by the Common Council of the said City of Rochester as hereinbefore described, together with the said map filed as aforesaid in said office of the clerk of the County of Monroe, State of New York, purporting to be so filed in accordance with the provisions of said Charter of said defendant City of Rochester, create an apparent defect in and is a cloud upon the title of said plaintiff, the Commonwealth of Massachusetts, in and to the said real property hereinbefore described and tend to make the said real property unmarketable.

[fol. 30] III. Part E

And the plaintiff further complains and says that Chapter 11 of the Consolidated Laws of the said defendant The State of New York is known as the "County Law," and that section 160 of said County Law provides for the election of a county clerk in each of the counties of the said State of New York. That the said defendant James L. Hotchkiss is the duly elected and acting county clerk of the County of Monroe, State of New York.

That section 161 of said County Law provides that the county clerk in each of said counties shall have the custody of all books, records, deeds, parchments, maps and papers deposited in his office in pursuance of law, and attend to their arrangement and preservation and shall provide all necessary books for recording all papers, documents or matters authorized by law to be required in his office.

That chapter 50 of the Consolidated Laws of the said defendant The State of New York is known as the "Real Property Law," and section 291 of said Real Property Law provides that "A conveyance of real property, with the state, on being duly acknowledged by the person executing the same, * * * may be recorded in the office of the Clerk of the County where such real property is situate."

That section 290 of said Real Property Law, subdivision 3, defines the term "conveyance" to include "every written instrument, by which any estate or interest, in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected."

[fol. 31] III. Part F

And the plaintiff further says that on or about the 16th day of February, 1921, the said Commissioner of Public Works of the said defendant City of Rochester entered into negotiations with the said plaintiff, the Commonwealth of Massachusetts, to sell, grant and convey to the said defendant City of Rochester the property of the said plaintiff, the Commonwealth of Massachusetts, hereinbefore described.

That on or about the 18th day of February, 1921, His Excellency Channing H. Cox, Governor of the said Commonwealth of Massa-

chusetts, informed the said Commissioner of Public Works of the said defendant City of Rochester that said negotiations for the sale of the said property by the said plaintiff, the Commonwealth of Massachusetts, to the said defendant City of Rochester, should await the termination of proceedings to remove the clouds at that time existing upon the title of the Commonwealth of Massachusetts in and to the real property of said Commonwealth of Massachusetts hereinbefore described.

[fol. 32] IV

Wherefore, the plaintiff prays:

1. That pending this suit your honors grant unto the plaintiff your Writ of Injunction restraining and enjoining the said defendant The State of New York and all persons claiming to act under its authority, direction or control from proceeding further with said condemnation proceedings; restraining and enjoining the said defendants Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal, from proceeding further with said condemnation proceedings and from making, filing and recording any report in said condemnation proceedings or otherwise; restraining and enjoining said defendant James L. Hotchkiss from filing and recording as clerk of the County of Monroe, State of New York, any report of the Commissioners in said condemnation proceedings or doing any other acts which may constitute and create a cloud upon the title of the plaintiff to the lands described herein; restraining and enjoining all of said defendants from taking any further proceedings in said condemnation proceedings and from doing any other acts which may constitute a cloud upon the plaintiffs' title to said land, until such time as your honors shall appoint and direct an order herein.

2. That on final hearing such Writ of Injunction be made permanent.

3. That on final hearing your honors may adjudge and decree that the alleged claims, titles, liens, encumbrances and interests hereinbefore set forth and referred to so far as they affect or refer to the said real property of the said plaintiff hereinbefore described, or [fol. 33] any part thereof, and each of them, are invalid and void, and that said defendants have not nor has any one of them any estate or interest in said property, or any part thereof; that the plaintiff's title to said property be adjudicated and established and that it may be adjudged and decreed that the plaintiff is the owner in fee of said property and that the said defendants, each and every one of them, be forever barred from asserting or claiming any estate or interest therein.

4. In the alternative, that on final hearing the plaintiff's right to receive adequate compensation from the defendant City of Rochester, and the amount thereof, be adjudicated and establisted.

5. And that your honors grant the plaintiff such other, further and general relief as to the court may seem just, proper and equitable.

Commonwealth of Massachusetts, by J. Weston Allen, Attorney-General.

[fol. 34] *Duly sworn to by J. Weston Allen. Jurat omitted in printing.*

[fol. 35] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

[fol. 36] ANSWER OF DEFENDANT, THE STATE OF NEW YORK—Filed October 12, 1922

To the Honorable the Justices of the Supreme Court of the United States:

Now comes The State of New York, one of the defendants in the above entitled action, by Charles D. Newton as Attorney-General and, agreeable to the directions of the Court, makes answer to the bill of complaint, as follows:

I

This defendant admits the allegations contained in subdivision I and subdivision II of plaintiff's complaint excepting that this defendant denies that plaintiff has title to the tract of land described in the complaint and claimed by plaintiff.

II

This defendant further admits the allegations contained in subdivision III, Part A, of plaintiff's complaint excepting the allegation that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts all or any part of the lands under the waters of Lake Ontario and excepting the allegation that the State of New York ceded to the Commonwealth of Massachusetts by the Hartford Treaty the parcel of land under the waters of Lake Ontario and included within the description set forth in subdivision III, Part A, and excepting the allegation that the Commonwealth of Massachusetts is the owner and is in possession of said parcel of land, which said allegations this defendant denies.

[fol. 37] III

This defendant further admits the allegations contained in subdivision III, Part B, of plaintiff's complaint.

IV

This defendant further admits the allegations contained in subdivision III, Part C, of plaintiff's complaint, excepting the allegation that the Commissioners of Appraisal are about to report that the compensation which they shall award should be paid to parties other than the rightful owner of the land, to wit: the plaintiff, which said allegation this defendant denies.

V

This defendant further admits the allegations contained in subdivision III, Part D, of plaintiff's complaint, excepting the allegations that the various deeds, mortgages, leases, assignments, agreements, ordinances, and maps create a cloud upon the title of the plaintiff and tend to make the real property described in said complaint unmarketable, which said allegations this defendant denies.

VI

This defendant further admits the allegations contained in subdivision III, Part E, of plaintiff's complaint.

VII

This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in subdivision III, Part F, of plaintiff's complaint.

[fol. 38]

VIII

This defendant further answering plaintiff's complaint, alleges that the parcel of land described in subdivision III, Part A, of plaintiff's complaint, situate in the City of Rochester, County of Monroe and State of New York, being appproximately one thousand six hundred eight-five and five-tenths (1,685.5) feet along the northerly line of Beach Avenue and extending northerly to the low water mark of Lake Ontario was substantially all under the waters of Lake Ontario prior to the year 1829; that since the year 1829 said parcel of land has formed by accretion or has been formed by artificial fill; that in the year 1887 said accretion or fill extended northerly of the north line of Beach Avenue and along the westerly line of said parcel a distance of approximately two hundred thirty eight (238) feet; that the remainder of the three hundred eighteen (318) feet along the westerly line and extending toward the center of Lake Ontario was under the waters of Lake Ontario; that on October 30, 1888, by letters patent dated that day and recorded in Book No. 44 of Patents at page 334 in the Office of the Secretary of State of the State of New York, the Commissioners of the Land Office of the State of New York, granted to the Bartholomay Brewing Company two parcels of land under the waters of Lake Ontario, a part of

which was and is included in the area sought to be acquired by the City of Rochester, and claimed by the Commonwealth of Massachusetts and described in subdivision III, Part A, of plaintiff's complaint; that the part under the waters of Lake Ontario in the year [fol. 39] 1887 which was granted to the Bartholomay Brewing Company and which is included within the area sought to be acquired by the City of Rochester, and claimed by the Commonwealth of Massachusetts, is described as follows:

All that tract or parcel of land situate, lying and being in the City of Rochester, County of Monroe and State of New York, bounded and described as follows:

Beginning at the intersection of the westerly line of Lake Avenue, and the shore line of Lake Ontario, as it existed in the year 1887 and running westerly along said shore line 410 feet, more or less; thence northerly 97 feet more or less to the present (1922) shore line of said Lake; thence easterly along said present shore line 410 feet more or less to the intersection of said present shore line and the westerly line of Lake Avenue; thence southerly along said westerly line of Lake Avenue, 135 feet more or less to the place of beginning.

Also, all that tract or parcel of land situate, lying and being in the City of Rochester, County of Monroe and State of New York, bounded and described as follows:

Beginning at a point in the shore line of Lake Ontario as it existed in the year 1887, said point being 510 feet more or less westerly from the intersection of said shore line and the westerly line of Lake Avenue, and running thence westerly along said shore line 80 feet, more or less; thence, northerly 80 feet more or less to the present (1922) shore line of said Lake; thence easterly along said [fol. 40] present shore line 80 feet more or less; thence southerly 84 feet more or less to the place of beginning.

Attached hereto is a map showing the portion of the lands sought to be acquired by the City of Rochester, which is claimed to be owned by the Commonwealth of Massachusetts; also, the part or parts thereof granted to the Bartholomay Brewing Company as hereinabove described.

IX

This defendant further answering plaintiff's complaint, alleges that the lands under the waters of Lake Ontario in the year 1888 and granted by the Commissioners of the Land Office to the Bartholomay Brewing Company by letters patent dated October 30, 1888, which the City of Rochester seeks to acquire and which are specifically described in subdivision VIII hereof, were not conveyed by the State of New York to the Commonwealth of Massachusetts by the terms of the Hartford Treaty, and that the People of the State of New York were the owners of such lands until they were so granted by the Commissioners of the Land Office to the Bartholomay Brewing Company.

X

This defendant further answering plaintiff's complaint, alleges that the People of the State of New York by the terms of the Hartford Treaty own all of the lands under the waters of Lake Ontario southerly of the Canadian boundary excepting such parts thereof [fol. 41] as have been granted by the People of the State of New York by legislative grants or letters patent, also excepting such parts thereof as have been lawfully filled in by natural accretion and become uplands.

XI

This defendant further answering plaintiff's complaint alleges that the People of the State of New York own all of the lands under the waters of Lake Ontario southerly of the Canadian boundary excepting such parts thereof as have been granted by the People of the State of New York by legislative grants or letters patent (not including any grant to the Commonwealth of Massachusetts); also, excepting such parts thereof as the Commonwealth of Massachusetts has assumed to grant for the reason that the grantees of the Commonwealth of Massachusetts are not parties to this action

XII

Wherefore, this defendant prays:

1. That the rights, claims and interests of all the parties to this action be adjudicated and finally determined.

2. That it be adjudged that the defendant, the State of New York, is the owner of so much of the lands formerly under the waters of Lake Ontario sought to be acquired by the City of Rochester as have not been granted by the People of the State of New York or as have not been lawfully filled in by accretion but have been unlawfully filled in by artificial means.

3. That it be adjudged that by the terms of the Hartford Treaty, the defendant, the State of New York, is the owner of all of the lands [fol. 42] formerly under the waters of Lake Ontario southerly of the Canadian boundary excepting such parts thereof as have been granted by the People of the State of New York by legislative grants or letters patent, also excepting such parts thereof as have been lawfully filled in by natural accretion and become uplands.

4. That it be adjudged that the defendant the State of New York is the owner of all of the lands under the waters of Lake Ontario southerly of the Canadian boundary excepting such parts thereof as have been granted by the People of the State of New York by legislative grants or letters patent (not including any grant to the Commonwealth of Massachusetts); also, excepting such parts thereof as the Commonwealth of Massachusetts has assumed to grant.

The State of New York, Defendant, by Charles D. Newton, Attorney-General, Capitol, Albany, N. Y.

[fol. 43] *Duly sworn to by Charles D. Newton. Jurat omitted in printing.*

(Here follows map of land involved in action entitled "The Commonwealth of Massachusetts vs. The State of New York et al.," marked side folio page 43a)

[fol. 44] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT THE CITY OF ROCHESTER—Filed October 12, 1922

[fol. 45] To the Honorable the Justices of the Supreme Court of the United States:

Now comes The City of Rochester, one of the defendants in the above entitled action, by Charles I. Pierce as Corporation Counsel and agreeable to the directions of the Court, makes answer to the Bill of Complaint of the plaintiff, as follows:

I

This defendant admits the status, organization and residence of the plaintiff and defendants, as set forth and alleged in subdivision I of plaintiff's complaint.

This defendant further admits all the allegations contained in subdivision II of plaintiff's complaint.

II

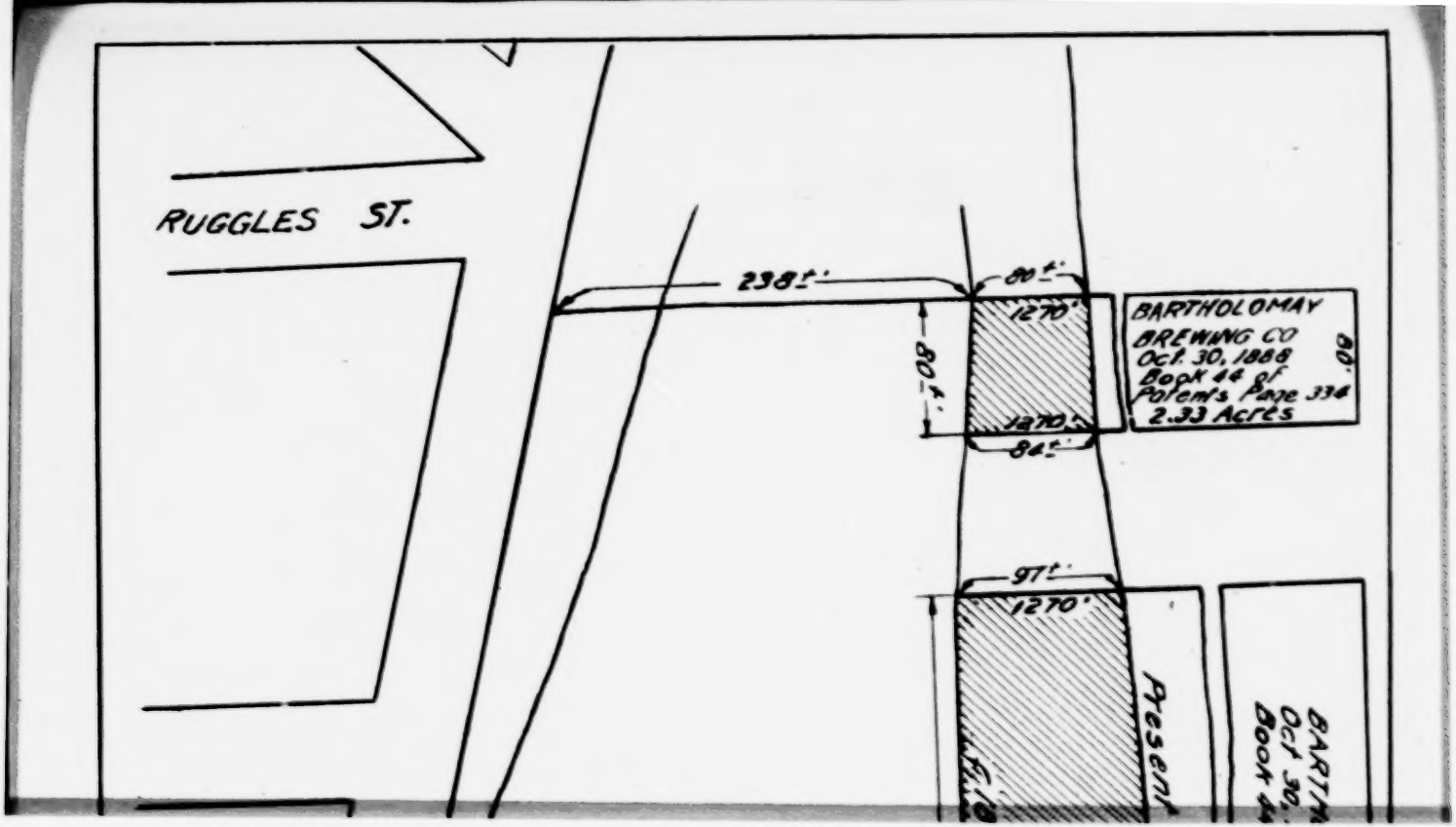
This defendant further admits all the allegations contained in subdivision III, Part A, of plaintiff's complaint, except the allegations that the plaintiff has never divested itself of its title to the parcel of land bounded and described in the complaint and herein in question, and is the owner and is in possession thereof, which said allegations this defendant denies.

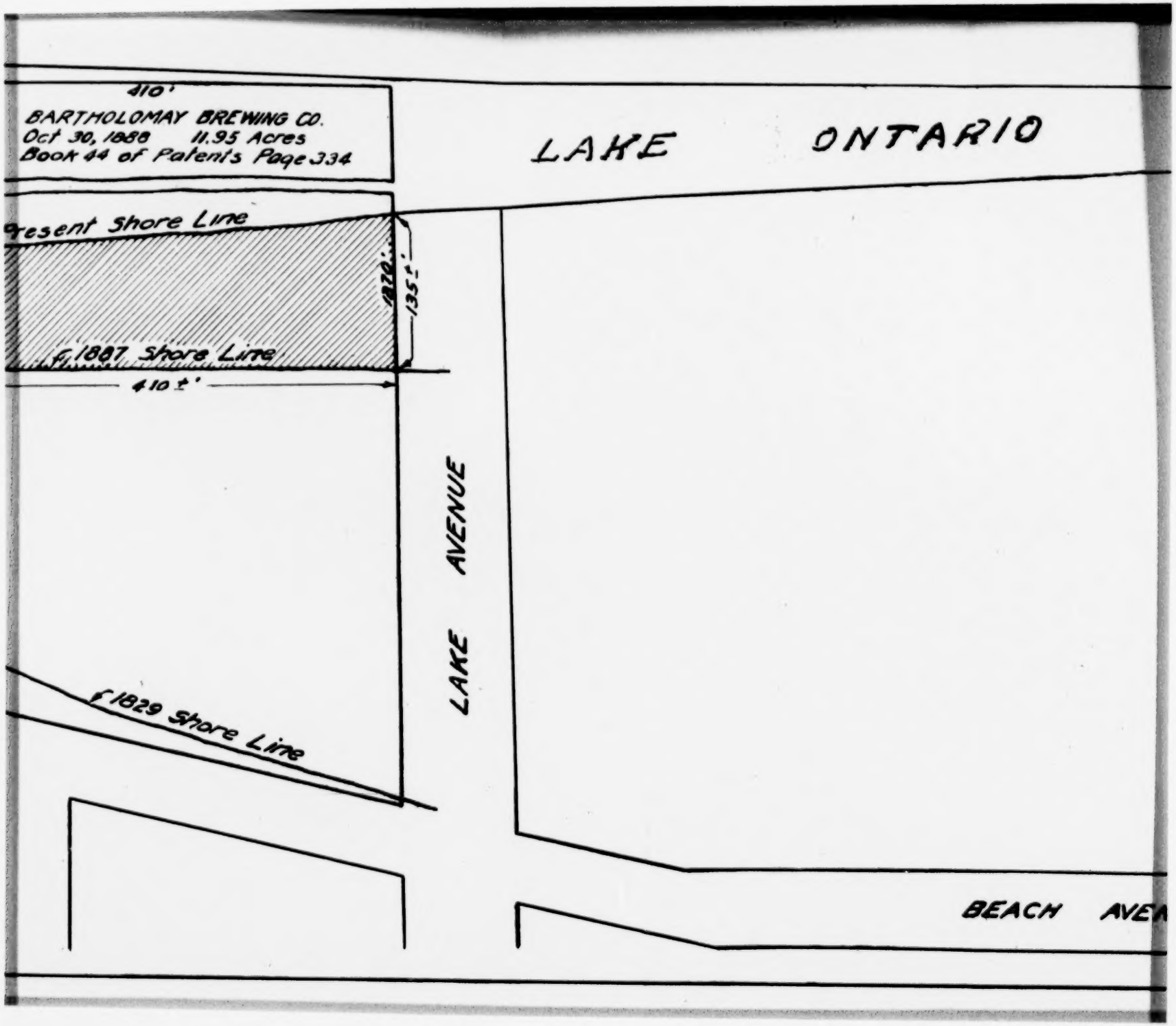
III

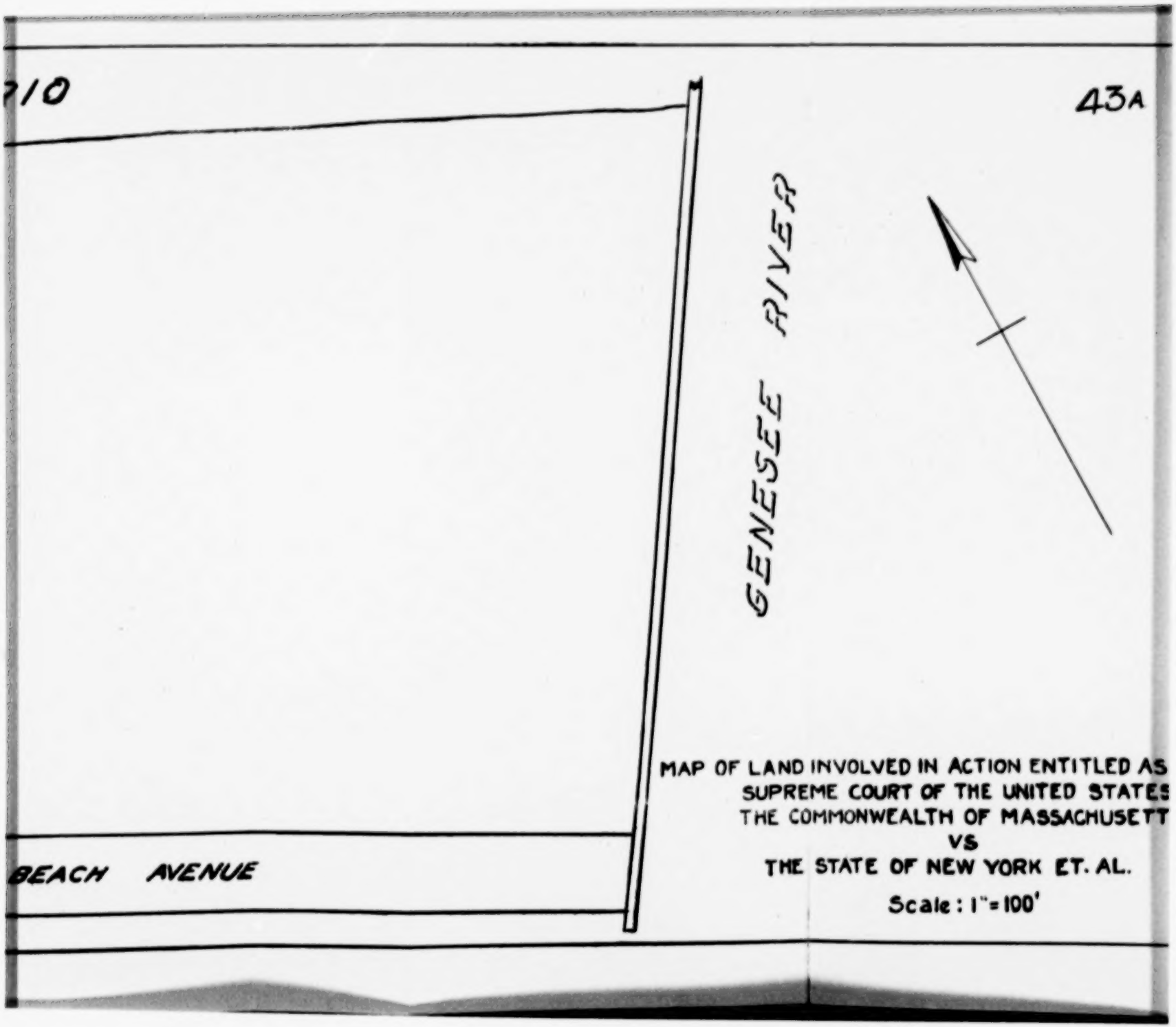
This defendant further admits all the allegations contained in subdivision III, Part B, of plaintiff's complaint.

IV

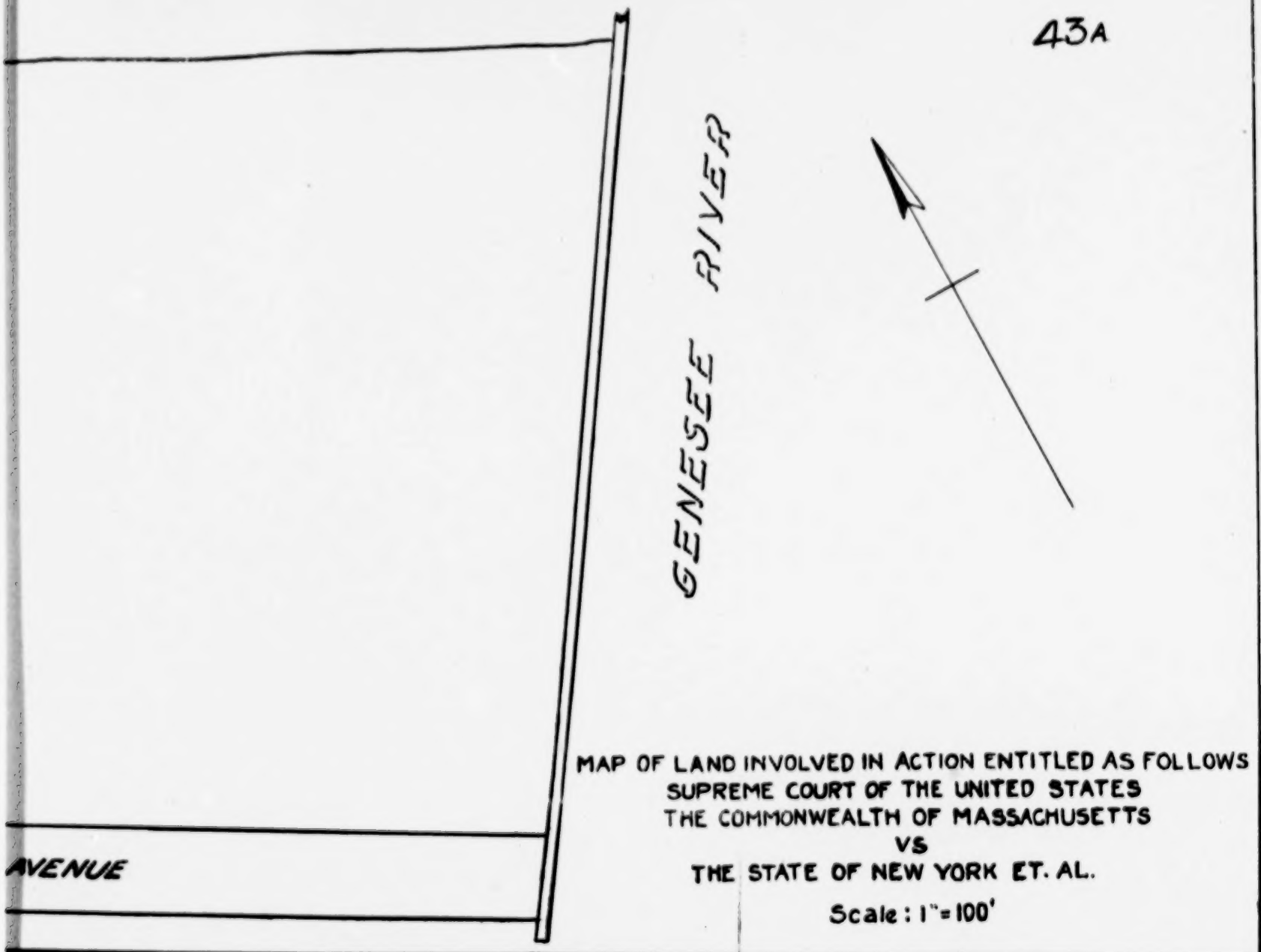
This defendant further admits all the allegations contained in subdivision III, Part C, of plaintiff's complaint, except the allegations [fol. 46] that the defendants Eugene Van Voorhis, J. A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal, are about to report that the compensation which they shall find due the owners, tenants or occupants of the lands in question and the buildings


RUGGLES ST.
238±'
80±'
80±'
1270'
1270'
84±'
BARTHOLOMAY
BREWING CO
Oct. 30, 1888
Book 44 of
Deeds Page 334
2.33 Acres
80'
97±'
1270'
Present
BARTH
Oct. 30,
Book 4


410'
BARTHOLOMAY BREWING CO.
Oct 30, 1868 11.95 Acres
Book 44 of Patents Page 334
LAKE ONTARIO
Present Shore Line
135±'
F. 1807 Shore Line
410±'
LAKE AVENUE
F. 1829 Shore Line
BEACH AVE


710
43A
GENESEE RIVER
BEACH AVENUE
MAP OF LAND INVOLVED IN ACTION ENTITLED AS
SUPREME COURT OF THE UNITED STATES
THE COMMONWEALTH OF MASSACHUSETT
VS
THE STATE OF NEW YORK ET. AL.
Scale : 1" = 100'

43A



MAP OF LAND INVOLVED IN ACTION ENTITLED AS FOLLOWS
SUPREME COURT OF THE UNITED STATES
THE COMMONWEALTH OF MASSACHUSETTS
VS
THE STATE OF NEW YORK ET. AL.

Scale : 1"=100'

thereon, should be paid to parties other than the rightful owner of the land, to wit: the plaintiff, which said allegations this defendant denies.

V

This defendant further admits all the allegations contained in subdivision III, Part D, of plaintiff's complaint, except the allegations that the various deeds, mortgages, leases, assignments, conveyances and liens and the ordinances adopted by the Common Council of The City of Rochester, together with the map filed in the Office of the Clerk of the County of Monroe, State of New York, purported to be filed in accordance with the provisions of the Charter of this defendant, create apparent defects in and clouds upon the title of the plaintiff and tend to make the said real property unmarketable, which allegations this defendant denies.

VI

This defendant further admits all the allegations contained in subdivision III, Part E, of plaintiff's complaint.

VII

This defendant further admits all the allegations contained in subdivision III, Part F, of plaintiff's complaint, except that this defendant denies that it entered into negotiations with the plaintiff to sell, grant and convey to this defendant the lands in question as being the property of the plaintiff, and this defendant alleges that [fol. 47] all negotiations had were for the purpose of procuring the plaintiff to convey to this defendant whatever right, title or interest it had in and to the said lands.

VIII

Further answering plaintiff's complaint this defendant alleges that it is in possession of said lands in question and of the whole thereof under and in pursuance of an order of a Court of competent jurisdiction, to wit: The Supreme Court of the State of New York, in condemnation proceedings duly instituted by this defendant; that this defendant began said proceedings to acquire said lands for public purposes, namely, for park purposes; that this defendant has duly entered into possession of said lands and expended large sums of money in improving and beautifying the same, and is now maintaining said lands as a public park upon which the public may come for purposes of recreation and diversion, all for the health and benefit of the community.

IX

Wherefore this defendant prays:

1. That the rights, claims and interests of all the parties to this action be adjudicated and finally determined.

2. That it be adjudged that the defendant, The City of Rochester, is in lawful possession of said lands and the whole thereof, and is entitled to remain in such possession.

3. That it be further adjudged that the defendants Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, as Commissioners of Appraisal, are authorized to determine the amount of [fol. 48] just compensation due all parties to this action and others, on account of all rights, titles, liens, interest and claims in, upon and in respect to said lands and any and all portions thereof, and that it be here adjudicated to whom such compensation shall be paid.

The City of Rochester Defendant, by Charles L. Pierce, Corporation Counsel.

Duly sworn to by Charles L. Pierce. Jurat omitted in printing.

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANTS EMIL BOSHART AND REBECCA BOSHART—Filed October 12, 1922

Emil Boshart and Rebecca Boshart by Harry Otis Poole, their solicitor, by leave of this Honorable Court, answer the Bill of Com- [fol. 50] plaint herein as follows, saving to themselves the benefit of all proprer exceptions to said Bill of Complaint:

1. Upon information and belief, they deny the allegation contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this Court against the defendant, The City of Rochester; they deny that, by the terms of the Hartford Treaty, the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; they deny that the lands described in the Bill of Complaint herein, of which the plaintiff claims to be the owner, were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty; they deny that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and deny that the Commonwealth — said parcel of land; they deny that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and

deny that the plaintiff is the owner of said lands, or any portion thereof; they deny that the lands, for the acquisition of which, the Common Council of The City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest in said lands.

[fol. 51] 2 They allege that they are the owners and holders of the record title to the following described land, located in the Twenty-third Ward in the City of Rochester, by deed from Emil Boshart and Arthur Tischbein to Rebecca Boshart, dated April 29th, 1912 and recorded in Liber 874 of Deeds, at page 486, in the Office of the Clerk of the County of Monroe, New York; by deed from the New York Central Railroad Company to Emil Boshart, dated April 25th, 1916 and recorded in Liber 990 of Deeds, at page 402, in the Office of the Clerk of the County of Monroe, New York:

Commencing on the North line of Beach Avenue and at the Southwest corner of a lot of land conveyed to the Rome, Watertown and Ogdensburg Terminal Railroad Company on or about the 27th day of April, 1888 (which point is about 30 feet west from the west line of a private street or avenue, leading from said Beach Avenue to Lake Ontario); thence running Northerly on the West line of said land conveyed to said Railroad Company; thence westerly from the Northwest corner of said Railroad land conveyed as aforesaid and at right angles to the West line thereof thirty-five (35) feet; thence Southerly in a straight line to the North line of said Beach Avenue; thence Easterly on the North line of said Beach Avenue about thirty-five (35) feet to the place of beginning. The premises hereby conveyed and described being the Easterly thirty-five (35) feet of a certain parcel of land conveyed to M. J. McIntyre by deed of conveyance from Martha McIntyre and dated April 27th, 1888 and recorded in Monroe County Clerk's office in Liber 472 of Deeds at page 256.

Beginning at a point in the southwesterly line of that parcel of [fol. 52] land conveyed by Cyrus Gatewood to Windsor Beach and Ontario Railroad Company, by deed dated January 31, 1888, recorded in the office of the Clerk of the County of Monroe, New York, in Liber 435 of Deeds, at page 8, said point being distant northwesterly thirty (30) feet at right angles from the northwesterly line of the private street or avenue, thirty (30) feet wide, extending from Beach Avenue to Lake Ontario;

And running thence northwesterly along the southwesterly line of said parcel of land conveyed by the aforesaid deed, seventy (70) feet, more or less, to the southwesterly corner of said parcel;

Thence northeasterly along the northwesterly line of said parcel of land conveyed by said Gatewood by deed as aforesaid, forty (40) feet, more or less, to the southwesterly line of that parcel of land secondly described in the deed from Oliver M. Benedict, as Referee,

to James M. Backus, recorded in the office of the Clerk of the County of Monroe, in Liber 329 of Deeds, at page 85;

Thence southeasterly along the southwesterly line of said parcel of land conveyed by said Benedict, as Referee, by deed as aforesaid, seventy (70) feet, more or less, to a point distant northwesterly thirty (30) feet at right angles from the northwesterly line of said private street or avenue extending from Beach Avenue to Lake Ontario;

Thence southwesterly, parallel with the northwesterly line of said private street or avenue forty (40) feet, more or less, to the place of beginning.

Containing two thousand, eight hundred (2,800) square feet of land, more or less.

All of which premises are included within the description of [fol. 53] lands set forth in the Bill of Complaint herein, of which the plaintiff claims to be the owner. And these defendants deny that the said deeds create an apparent defect in and deny that they are a cloud upon the title of plaintiff, the Commonwealth of Massachusetts; they deny that said deeds tend to make said property unmarketable; and they deny that the Commonwealth of Massachusetts is the owner of, or has any title to or interest in the property above described.

And these defendants deny that the mortgage of the Twentieth Ward Co-Operative Savings and Loan Association, recorded in Monroe County Clerk's office, State of New York, April 25, 1917 in Liber 716 of Mortgages at page 287, which is a lien on said lands of said defendants, creates an apparent defect in and deny it is a cloud upon the title of plaintiff, the Commonwealth of Massachusetts, and these defendants allege that said mortgage is valid in all respects and a first lien on said lands of said defendants and was made by said defendants to said Twentieth Ward Co-Operative Savings and Loan Association without any knowledge of any claim of The Commonwealth of Massachusetts to the title or the ownership of said lands of said defendants.

3. These defendants further allege that on or about the first day of July, 1919, they entered into an agreement with the City of Rochester, whereby defendants surrendered and delivered to the City of Rochester the possession of said lands, and whereby the City of Rochester agreed to institute condemnation proceedings, under the right of eminent domain of the State of New York, for the purpose of securing the full legal title to the said lands and to prosecute said proceedings with all convenient speed and to pay to the owner of said lands the amount awarded in the final report of the Commissioners appointed, in accordance with the provisions of [fol. 54] law, together with interest at the rate of six per cent per annum on the full amount of said award from July 1, 1919, to the date of the payment of said award.

4. These defendants further allege that the State of New York, pursuant to an act of its legislature amending the charter of the

City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes, and such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the lands owned by these defendants aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands and, on or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with these [fol. 55] defendants, the said city did enter into possession of the said lands and has ever since been in possession thereof.

5. These defendants further allege that the said commissioners of appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by these defendants and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to these defendants or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said commissioners of appraisal and full opportunity to present proofs of the value of said land and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the commissioners of appraisal.

6. These defendants further allege that they were not deprived of their title to their said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the commissioners of appraisal.

7. These defendants further allege that, in and by the Treaty of Hartford, referred to go in the Bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and

jurisdiction of the lands and territories therein described, and the State of New York, ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property [fol. 56] (the right and title of government, sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

8. These defendants further allege that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereon; that on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the Office of the Secretary of State of the Commonwealth of Massachusetts.

9. These defendants further allege that the lands above described and owned by them are a part of the lands and territories so purchased [fol. 57] by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, or were formed by accretion upon the bed of Lake Ontario adjacent to said lands, title to which accrued to said Phelps and Gorham and their successors in title as owners of the uplands, and that the chain of title in and to their said lands passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps to these defendants and is clear, unimpaired and unbroken from April 1st, 1788, to the present time; that these defendants and their predecessors in title were in actual continuous and uninterrupted possession of said lands from the 1st day of April, 1788, until the possession thereof was surrendered to the City of Rochester, as hereinbefore alleged.

10. These defendants further allege that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded

to it, and that the Commonwealth of Massachusetts has had no right or interest in the above-described lands of these defendants, nor in the lands under the waters of Lake Ontario since the 16th day of December, 1786.

11. These defendants further allege, upon information and belief, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

12. These defendants further allege that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no [fol. 58] further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

13. These defendants further allege, upon information and belief, that since April 1, 1788, the Commonwealth of Massachusetts has not made or asserted a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent, and that since said date, the Commonwealth of Massachusetts has not been in possession of said lands, or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

14. These defendants further allege that they and their predecessors, relying on long continued and uninterrupted occupation and ownership of their lands above described, and on the fact that no adverse claim thereto has been made, have expended large sums of money for taxes thereon and in the development and improvement thereof.

15. These defendants further allege that the plaintiff, Commonwealth of Massachusetts, has granted and ceded away all of its right, title and interest in and to the premises described in the Bill of Complaint herein; and that, by its public acts and by its long continued silence and acquiescence it is estopped from claiming any right, title or interest in the premises described in the Bill of Complaint herein.

16. These defendants further allege that by the terms of the Treaty of Hartford, the State of New York, as an attribute of the sovereignty and jurisdiction retained by and ceded to it, has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester, as hereinbefore [fol. 59] stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign State, and cannot be heard on its application for

a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

Wherefore these defendants pray that the plaintiff's Bill of Complaint be dismissed, with costs to these defendants.

Harry Otis Poole, Solicitor for Emil Boshart and Rebecca Boshart, 339 Powers Building, Rochester, N. Y.

Duly sworn to by Emil Boshart et al. Jurat omitted in printing.

[fol. 60] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT JAMES L. HOTCHKISS, CLERK OF THE COUNTY OF MONROE, STATE OF NEW YORK—Filed October 12, 1922

To the Honorable the Justices of the Supreme Court of the United States:

[fol. 61] Now comes James L. Hotchkiss, one of the defendants in the above entitled action, by George Y. Webster as County Attorney and, agreeable to the directions of the Court, makes answer to the Bill of Complaint of the plaintiff, as follows:

I

This defendant admits the status, organization and residence of the plaintiff and defendants, as set forth and alleged in subdivision I of plaintiff's complaint.

This defendant further admits all the allegations contained in subdivision II of plaintiff's complaint.

II

This defendant further admits all the allegations contained in subdivision III, Part A, of plaintiff's complaint, except the allegations that the plaintiff has never divested itself of its title to the parcel of land bounded and described in the complaint and herein in question, and is the owner and is in possession thereof, which said allegations this defendant denies.

III

This defendant further admits all the allegations contained in subdivision III, Part B, of plaintiff's complaint.

IV

This defendant further admits all the allegations contained in subdivision III, Part C, of plaintiff's complaint, except the allega-

[fol. 62] tions that the defendants Eugene Van Voorhis, J. A. Vanderwerf and Charles C. Beahan, Commissioners of Appraisal, are about to report that the compensation which they shall find due the owners, tenants or occupants of the lands in question and the buildings thereon, should be paid to parties other than the rightful owner of the land, to wit: the plaintiff, which said allegations this defendant denies.

V

This defendant further admits all the allegations contained in subdivision III, Part D, of plaintiff's complaint, except the allegations that the various deeds, mortgages, leases, assignments, conveyances and liens and the ordinances adopted by the Common Council of The City of Rochester, together with the map filed in the Office of the Clerk of the County of Monroe, State of New York, purported to be filed in accordance with the provisions of the Charter of this defendant, create apparent defects in and clouds upon the title of the plaintiff and tend to make the said real property unmarketable, which allegations this defendant denies.

VI

This defendant further admits all the allegations contained in subdivision III, Part E, of plaintiff's complaint.

VII

This defendant further admits all the allegations contained in subdivision III, Part F, of plaintiff's complaint, except that this defendant denies that the City of Rochester entered into negotiations with the plaintiff to sell, grant and convey to this defendant [fol. 63] the lands in question as being the property of the plaintiff, and this defendant alleges that all negotiations had were for the purpose of procuring the plaintiff to convey to said defendant whatever right, title or interest it had in and to the said lands.

VIII

Wherefore this defendant prays:

1. That the rights, claims and interests of all the parties to this action be adjudicated and finally determined.

2. That it be adjudged that the defendant, The City of Rochester, is in lawful possession of said lands and the whole thereof, and is entitled to remain in such possession.

James L. Hotchkiss, Clerk of the County of Monroe, State of New York, Defendant, by George Y. Webster, County Attorney.

[fol. 64] *Duly sworn to by James L. Hotchkiss. Jurat omitted in printing.*

[fol. 65] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANTS EUGENE VAN VOORHIS, JOHN A. VANDERWERF, AND CHARLES C. BEAHAN, AS COMMISSIONERS OF APPRAISAL—Filed October 12, 1922

To the Honorable the Justices of the Supreme Court of the United States:

The defendants Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, as Commissioners of Appraisal for their answer to the Bill of Complaint in this action allege as follows:

They admit and allege that they are the Commissioners of Appraisal appointed by the Supreme Court of the State of New York in a proceeding instituted by the City of Rochester a municipal corpora-[fol. 66] tion of the State of New York to acquire lands for public use in a proceeding entitled:

"In the Matter of the application of the City of Rochester to acquire certain lands for park and other municipal purposes in the Twenty-third Ward in said City."

That they have taken proof of the claims of the various parties who have appeared before them and have made proofs of their respective claims and of the value of the property rights taken in each case. That the proofs are not closed and there has been no determination by them of the rights, title or interest of any of the claimants. They deny that they are about to appraise the damages and compensation which the various parties have taken and the amount of compensation which they have severally received therefor; and they deny that they are about to report that the same should be paid to parties other than the plaintiff, and allege in this behalf that the Commission has been at all times ready and willing to hear any proofs which the plaintiff chooses to make before them. That the plaintiff has appeared before the Commission specially and objected to the jurisdiction of these defendants as commissioners upon the ground that the title of Massachusetts in land acquired under the Hartford treaty could not be made the subject of adjudication in condemnation proceedings before Commissioners appointed by a Court of the State of New York. And these defendants further allege that in and by the Treaty of Hartford under which the plaintiff claims title to the lands in question it was provided as the first Cession, Grant and Release therein contained as follows:

[fol. 67] "The Commonwealth of Massachusetts doth hereby Cede, Grant, Release and Confirm to the State of New York Forever all the claim, right and title which the Commonwealth of Massachusetts hath to the government, sovereignty and jurisdiction of the lands and territories"

claimed by the State of New York including the lands in question. That the right granted by such treaty to the Commonwealth of Massachusetts was the "right of preemption of the soil from the native Indians and all their estate, right, title and interest (the right and title of government, sovereignty and jurisdiction excepted), which the State of New York hath of, in or to" the lands covered by the said agreement; and these defendants refer to the full and complete terms of the said Treaty of Hartford and make the same a part of this answer.

These defendants further allege (1), that the proceeding in which they are acting was taken pursuant to the statutory provisions of the State of New York granting to the City of Rochester the right to take lands for park and other municipal purposes upon making due compensation therefor. That such statutes constitute a due delegation of the sovereign power of the State of New York to take property for public purposes in invitum which right of sovereignty was expressly included in the grant from the Commonwealth of Massachusetts to the State of New York in the Hartford Treaty aforesaid. And these defendants allege and aver that the Supreme Court of the State of New York had and has full, complete and exclusive jurisdiction of all matters and questions involved in this action and that these defendants by virtue of their appointment as Commissioners have full and complete jurisdiction to determine the value of the lands taken and the compensation to be made therefor; (2) [fol. 68] that the Commonwealth of Massachusetts having expressly granted to the State of New York the government, sovereignty and jurisdiction of the lands in question cannot now be heard to question the jurisdiction of these defendants acting in their official capacity.

Wherefore these defendants demand that the plaintiff's complaint be dismissed.

Eugene Van Voorhis, Attorney for Defendants, 500 Powers Block, Rochester, N. Y.

Duly sworn to by Eugene Van Voorhis. Jurat omitted in printing.

[fol. 69] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT TWENTIETH WARD CO-OPERATIVE SAVINGS & LOAN ASSOCIATION—Filed October 12, 1922

1. Upon information and belief, it denies that plaintiff is the [fols. 70 & 71] owner or is in possession of the lands described in a certain mortgage given by Rebecca Boshart, one of the defendants herein, to this defendant, acknowledged the 24th day of April, 1917, and more specifically referred to in plaintiff's bill of complaint; it denies that this mortgage tends to make said lands unmarketable.

2. It alleges that the chain of title in and to said lands passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps to the defendant Rebecca Boshart, and is clear, unimpaired and unbroken from April 1st, 1788, to the present time.

3. It further alleges that relying on such chain of title it made a loan to said Rebecca Boshart, and as security therefor received a mortgage covering said land, which mortgage remains unpaid, and is a valid lien against said lands.

4. It further alleges that to declare the title of the defendant Rebecca Boshart to said lands, and the lien of this defendant thereon invalid and void, will be inequitable, and a great injustice to this defendant.

Wherefore this defendant prays that plaintiff's bill of complaint be dismissed with costs to this defendant.

George V. Holton, Solicitor for Twentieth Ward Co-operative Savings & Loan Association, 30 Rochester Savings Bank Bldg., Rochester, New York.

Duly sworn to by Henry A. Mensing. Jurat omitted in printing.

[fol. 72] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

MOTION BY CERTAIN DEFENDANTS FOR REFERENCE TO AND APPOINTMENT OF SPECIAL MASTER—Filed November 27, 1922

The defendants, The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe in the State of New York; Eugene Van Voorhis, John A. Vanderwerf, and Charles C. Beahan as Commissioners of Appraisal; New York Central Railroad Company, Central Union Trust Company of New York, Ontario Beach Hotel & Amusement Company, Emil Boshart, Rebecca Boshart, Milton J. McIntyre, Belle McIntyre, Bartholomay Company, Inc., and Twentieth Ward Co-Operative Savings & Loan Association, (reserving all their rights to object to the jurisdiction of the court over the subject matter of this action, and to the sufficiency of the complaint), respectfully pray:

That this Honorable Court will refer the above entitled case to a Special Master to be designated and appointed, to take the proofs [fol. 73] and make an advisory report to the Court upon the material allegations and questions of fact raised by the pleadings (with his opinion as to the law of the case), except as to the amount of damages to be paid for the property taken by the City of Rochester by eminent domain.

Charles L. Pierce, Solicitor for Defendant The City of Rochester George Y. Webster, Solicitor for Defendant James L. Hotchkiss, Clerk of the County of Monroe, State of New

York. Eugene Van Voorhis, Solicitor for Defendants Eugene Van Voorhis, John A. Vanderwerf, and Charles C. Beahan, as Commissioners of Appraisal. Daniel M. Beach, Solicitor for Defendants New York Central Railroad Company and Central Union Trust Company of New York. Arthur E. Sutherland, Solicitor for Defendant Ontario Beach Hotel & Amusement Company. Harry Otis Poole, Solicitor for Defendants Emil Boshart and Rebecca Boshart and Milton J. McIntyre and Belle McIntyre. Clarence P. Moser, Solicitor for Defendant Bartholomay Company, Inc. William F. Love, Solicitor for Twentieth Ward Co-operative Savings & Loan Association.

[fol. 74] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

To the Honorable J. Weston Allen, Attorney General of the Commonwealth of Massachusetts, plaintiff, and to the Honorable Charles D. Newton, Attorney General of the State of New York, defendant:

You will please take notice, that upon the bill of complaint and upon the answers filed thereto, and upon the annexed affidavit of Arthur E. Sutherland, verified November 15, 1922, a motion will be made before the Supreme Court of the United States on Monday, November 27, 1922, on behalf of the defendants, The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe, New York; Eugene Van Voorhis, John A. Vanderwerf, and Charles C. Beahan [fol 75] as Commissioners of Appraisal; New York Central Railroad Company; Central Union Trust Company of New York; Ontario Beach Hotel & Amusement Company; Emil Boshart, Rebecca Boshart, Milton J. McIntyre, Belle McIntyre, Bartholomay Company, Inc.; and Twentieth Ward Co-Operative Savings & Loan Association, at the opening of the court on that day, or as soon thereafter as counsel can be heard, that (reserving all the rights of said defendants to object to the jurisdiction of this court over the subject matter of this action, and to the sufficiency of the complaint) this Honorable Court will refer the above entitled case to a Special Master to be designated and appointed, to take the proofs and make an advisory report to the Court upon the material allegations and questions of fact raised by the pleadings with his opinion as to the law of the case, except as to the amount of damages to be paid for the property taken by the City of Rochester by eminent domain.

Charles L. Pierce, Solicitor for Defendant The City of Rochester. George Y. Webster, Solicitor for Defendant James L. Hotchkiss, Clerk of the County of Monroe, in the State of New York. Eugene Van Voorhis, Solicitor for Defendants Eugene Van Voorhis, John A. Vanderwerf, and

Charles C. Beahan, as Commissioners of Appraisal. Daniel M. Beach, Solicitor for Defendants New York Ceneral Railroad Company and Central Union Trust Company of New York. Arthur E. Sutherland, Solicitor for Defendant Ontario Beach Hotel & Amusement Company. Harry [fol. 76] Otis Poole, Solicitor for Defendants Emil Boshart and Rebecca Boshart and Milton J. McIntyre and Belle McIntyre. Clarence P. Moser, Solicitor for Defendant Bartholomay Company, Inc. William F. Love, Solicitor for Twentieth Ward Co-operative Savings & Loan Association.

[fol. 77] In Supreme Court of the United States

[Title omitted]

State of New York,
County of Monroe,
City of Rochester, ss:

Arthur E. Sutherland, being duly sworn, deposes and says:

I am the solicitor for the defendant, Ontario Beach Hotel & Amusement Company, in this action. I am informed and believe that answers have been filed to the bill of complaint by defendants, The State of New York, The City of Rochester, James L. Hotchkiss, Clerk of the County of Monroe in the State of New York; Eugene Van Voorhis, John A. Vanderwerf, and Charles C. Beahan as Commissioners of Appraisal; New York Central Railroad Company, Central Union Trust Company of New York, Ontario Beach Hotel & Amusement Company, Emil Boshart, Rebecca Boshart, [fol. 78] Milton J. McIntyre, Belle McIntyre, Bartholomay Company, Inc., and Twentieth Ward Co-Operative Savings & Loan Association.

The trial of the issues raised by said answers will require the taking of testimony of numerous witnesses residing in and near the city of Rochester, N. Y., particularly with regard to the fact as to whether the land described in the complaint or any part thereof was made out of the bed of Lake Ontario by artificial filling in, or by the process of natural accretion; and will also require the investigation of documents on file in public offices in the City of Boston, Massachusetts, and records in Albany, Rochester, Canadaigua, and Batavia, in the State of New York, and it is the opinion of all of the solicitors who unite in this motion on behalf of the defendants represented by them that the convenience of the parties and of this Court will be promoted, and the trial of the action and the ultimate argument of the questions involved before this court simplified, by the appointment of a Special Master to take the evidence and make an advisory report concerning the facts established and the questions of law involved.

Arthur E. Sutherland.

Sworn to before me this 15th day of November, 1922. Clara M. Perkins, Notary Public. (Seal.)

[fols. 79 & 79a] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER APPOINTING SPECIAL MASTER—Filed January 2, 1923

The motion of the defendants The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe in the State of New York; Eugene Van Voorhis, John A. Vanderwerf, and Charles C. Beahan, as Commissioners of Appraisal; New York Central Railroad Company, Central Union Trust Company of New York, Ontario Beach Hotel & Amusement Company, Emil Boshart, Rebecca Boshart, Milton J. McIntyre, Belle McIntyre, Bartholomay Company, Inc., and Twentieth Ward Co-operative Savings & Loan Association, that the above-entitled cause be referred to a Special Master, having been heretofore granted,

It is now here ordered by this court, by agreement of counsel, that Wade H. Ellis, Esquire, be, and he is hereby, appointed Special Master to take proofs and make reports to the Court in this cause.

January 2, 1923.

[fol 80] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

[fol. 81] ANSWER OF DEFENDANTS MILTON J. MCINTYRE AND BELLE MCINTYRE—Filed February 20, 1923

Milton J. McIntyre and Belle McIntyre by Harry Otis Poole, their solicitor, by leave of this Honorable Court, answer the Bill of Complaint herein as follows, saving to themselves the benefit of all proper exceptions to said Bill of Complaint:

1. Upon information and belief, they deny the allegation contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this Court against the defendant, The City of Rochester; they deny that, by the terms of the Hartford Treaty, the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; they deny that the lands described in the Bill of Complaint herein, of which the plaintiff claims to be the owner, were included in the lands ceded by the State of New York to the Commonwealth of Massa-

chusetts by the Hartford Treaty; they deny that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and deny that the Commonwealth of Massachusetts is the owner or in possession of said parcel of land; they deny that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and deny that the plaintiff is the owner of said lands, or any portion thereof; [fol. 82] they deny that the lands, for the acquisition of which, the Common Council of The City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest in said lands.

2. They allege that they are the owners and holders of record titles to the following described land located in the Twenty-third (23) Ward in the city of Rochester by deed from Martha M. McIntyre dated April 27, 1888 and recorded in Liber 472 of Deeds at page 256 in the Office of the Clerk of the County of Monroe, New York, being a part of original Lot No. 20 in the village of Charlotte and described as follows: Commencing at the south-west corner of land deed- this day to the Rome, Watertown & Ogensburg Terminal Railroad Co. on the north line of Beach Avenue about thirty (30) feet from the west line of the private street or avenue leading from Beach Avenue to Lake Ontario; thence running northerly on the west line of the lands deeded to said company; thence westerly from the northwest corner of said land at right angles to said west line seventy (70) feet to lands sold by James M. Whitney and wife to Joseph D. Husbands and others; thence southerly along said Husbands' land and parallel with the west line of lot No. 20 to the north line of Beach Avenue; thence easterly on the north line of Beach Ave. about (70) feet to the place of beginning; together with the use and privilege of the beach at the end of said private street or avenue and for a distance of one hundred (100) feet westerly therefrom, in common with the owners of lots on said private street or avenue and the owners of lots in the south-west quarter of said Lot No. 20 for the purpose of boating and bathing. Excepting and reserving from said prem- [fol. 83] ises the east 35 feet thereof conveyed to Emil Boshart and Arthur L. Tischbein by deed recorded in Monroe County Clerk's Office in Liber 876 of Deeds at page 369. All of which premises are included within the description of lands set forth in the Bill of Complaint herein, of which the plaintiff claims to be the owner. And these defendants deny that the said deeds create an apparent defect in and deny that they are a cloud upon the title of plaintiff, the Commonwealth of Massachusetts; they deny that said deeds tend to make said property unmarketable; and they deny that the Com-

monwealth of Massachusetts is the owner of, or has any title to or interest in the property above described.

3. These defendants further allege that, on or about the first day of July, 1919, they entered into an agreement with the City of Rochester, whereby defendants surrendered and delivered to the City of Rochester the possession of said lands, and whereby the City of Rochester agreed to institute condemnation proceedings, under the right of eminent domain of the State of New York, for the purpose of securing the full legal title to the said lands and to prosecute said proceedings with all convenient speed and to pay to the owner of said lands the amount awarded in the final report of the Commissioners appointed, in accordance with the provisions of law, together with interest at the rate of six per cent per annum on the full amount of said award from July 1, 1919, to the date of the payment of said award.

4. These defendants further allege that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Counsel, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent [fol. 84] domain for the public municipal purposes and uses of said City, including public park purposes, and such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the lands owned by these defendants aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands and, on or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with these defendants, the said city did enter into possession of the said lands and has ever since been in possession thereof.

5. These defendants further allege that the said commissioners of appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by these defendants and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to these defendants or other

[fol. 85] owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said commissioners of appraisal and full opportunity to present proofs of the value of said land and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the commissioners of appraisal.

6. These defendants further allege that they were not deprived of their title to their said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the commissioners of appraisal.

7. These defendants further allege that, in and by the Treaty of Hartford, referred to in the Bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York, ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

8. These defendants further allege that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gor-[fol. 86] ham were authorized to extinguish by purchase the claims of the native Indians thereon; that, on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the Office of the Secretary of State of the Commonwealth of Massachusetts.

9. These defendants further allege that the lands above described and owned by them are a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, or were formed by accretion upon the bed of Lake Ontario adjacent to said lands, title to which accrued to said Phelps and Gorham and their successors in title as owners of the uplands, and that the chain of title in and to their said lands passed by mesne conveyance from Nathaniel Gorham and Oliver Phelps to these defendants and is clear, unimpaired and unbroken from April 1st, 1788, to the present time; that these defendants and their predecessors in title were in actual continuous [fol. 87] and uninterrupted possession of said lands from the 1st day of April, 1788, until the possession thereof was surrendered to the City of Rochester, as hereinbefore alleged.

10. These defendants further allege that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and that the Commonwealth of Massachusetts has had no right or interest in the above-described lands of these defendants, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

11. These defendants further allege, upon information and belief, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

12. These defendants further allege that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

13. These defendants further allege, upon information and belief, that since April 1, 1788, the Commonwealth of Massachusetts has not made or asserted a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent, and that since said date, the Commonwealth of Massachusetts has not been in possession of said lands, or any [fol. 88] part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

14. These defendants further allege that they and their predecessors, relying on long continued and uninterrupted occupation and ownership of their lands above described, and on the fact that no adverse claim thereto has been made, have expended large sums

of money for taxes thereon and in the development and improvement thereof.

15. These defendants further allege that the plaintiff, Commonwealth of Massachusetts, has granted and ceded away all of its right, title and interest in and to the premises described in the Bill of Complaint herein; and that, by its public acts and by its long-continued silence and acquiescence it is estopped from claiming any right, title or interest in the premises described in the Bill of Complaint herein.

16. These defendants further allege that by the terms of the Treaty of Hartford, the State of New York, as an attribute of the sovereignty and jurisdiction retained by and ceded to it, has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester, as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign State, and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

[fol. 89] Wherefore, these defendants pray that the plaintiff's Bill of Complaint be dismissed, with costs to these defendants.

Harry Otis Poole, Solicitor for Milton J. McIntyre and Belle McIntyre, 339 Powers Building, Rochester, N. Y.

Duly sworn to by Milton J. McIntyre et al. Jurat omitted in printing.

[fol. 90] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

SUGGESTION OF DEATH OF ANNA T. GRANGER, AND MOTION TO SUBSTITUTE JOHN A. GRANGER AND HIS WIFE, EMMA R. GRANGER, EXECUTORS, AS PARTIES DEFENDANT—Filed February 26, 1923

Now comes the Commonwealth of Massachusetts, plaintiff in the above-entitled action, and says that it is informed and believes, and therefore avers, that Anna T. Granger, one of the defendants named in the original bill of complaint, died on or about January 3, 1922, prior to service of said bill upon her; that the complainant is informed and believes, and therefore avers, that all the right, title and interest of said Anna T. Granger, if any she had, is now vested in John Albert Granger and his wife, Emma R. Granger, of Chicago, in the State of Illinois, and in Gideon Granger, of Naples, in the State of New York, the said John Albert Granger and the said Gideon Granger being sons of the said Anna T. Granger, deceased.

Wherefore, the plaintiff prays:

(1) That the bill of complaint heretofore filed may be amended by striking therefrom the name of Anna T. Granger and substituting [fol. 91] therefor the name- of John Albert Granger, Emma R. Granger and Gideon Granger.

(2) That page 4 of the bill of complaint be amended by striking therefrom the following allegation, to wit: "Anna T. Granger, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of the said State of New York and a resident of the Township of South Bristol in the County of Ontario in the said State of New York," and inserting in place thereof the following, to wit:

John Albert Granger, by virtue of the laws of the State of Illinois a citizen of said State of Illinois, and in fact a citizen of said State of Illinois and a resident of Chicago, in Cook County in said State of Illinois:

Emma R. Granger, wife of said John Albert Granger, by virtue of the laws of the State of Illinois a citizen of said State of Illinois, and in fact a citizen of said State of Illinois and a resident of Chicago in Cook County in said State of Illinois;

Gideon Granger, by virtue of the laws of the State of New York a citizen of said State of New York, and in fact a citizen of said State of New York and a resident of the village of Naples in the township of South Bristol in the County of Ontario in said State of New York.

(3) That said John Albert Granger, said Emma R. Granger and said Gideon Granger may be brought in as parties defendant.

[fol. 92] (4) That this honorable court order the said John Albert Granger, the said Emma R. Granger and the said Gideon Granger to answer to the bill of complaint, within such time as this honorable court may fix.

(5) That leave be granted to the said John Albert Granger, the said Emma R. Granger and the said Gideon Granger to file answers to the bill of complaint, pursuant to the order aforesaid.

Commonwealth of Massachusetts, by Jay R. Benton, Attorney General; Edwin H. Abbot, Jr., of Counsel.

We hereby assent to the allowance of the above motion.

John Albert Granger, Emma R. Granger, Gideon Granger, by their attorney, Harry C. Miller, 2 Rector St., New York City.

[File endorsement omitted.]

[fol. 93] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

AMENDED AND SUPPLEMENTAL ANSWER OF DEFENDANT ONTARIO BEACH HOTEL AND AMUSEMENT COMPANY—Filed May 1, 1923

Ontario Beach Hotel and Amusement Company, one of the defendants, by Arthur E. Sutherland, its solicitor, by leave of this Honorable Court, makes the following as its amended and supplemental answer to the original bill of complaint filed against this defendant by the Commonwealth of Massachusetts through its Attorney General, saving to the said defendant the benefit of all proper exceptions to said bill of complaint.

[fol. 94] 1. It admits that the said Ontario Beach Hotel and Amusement Company is the owner and holder of the lease of a portion of the real property referred to in the bill of complaint made October 1, 1883 by the New York Central and Hudson River Railroad Company to Henry H. Craig and Eli M. Upton, purporting to convey with other real property to said lessees and their assigns for a term of fifty years from the 1st day of October, 1883 to the first day of October, 1933 that portion of the premises now in the City of Rochester, which the plaintiff seeks to recover in this action which lies north of Beach Avenue and east of Broadway and is bounded on the east by the Genesee River and on the north by the south shore of Lake Ontario.

Said defendant admits that said lease was recorded December 27, 1884 in Liber 389 of Deeds at page 374 in the office of the Clerk of the County of Monroe and State of New York, and was thereafter duly assigned by several mesne assignments, and became the property of the said defendant, Ontario Beach Hotel and Amusement Company by an assignment to it by Charles H. Palmer, executed April 24th, 1906, and recorded in said County Clerk's office May 11, 1906, in Liber 735 of deeds at page 21, and it admits that said lease so held and now owned by the defendant Ontario Beach Hotel and Amusement Company is not void upon its face and creates upon the record a claim of title and ownership which is hostile and adverse to the claim of title to said leased premises now asserted in the Bill of Complaint by the Commonwealth of Massachusetts; but said defendant Ontario Beach Hotel and Amusement Company alleges that the Commonwealth of Massachusetts has no rightful claim or title in or to any portion of said leased [fol. 95] premises but that the lawful title in fee in and to said leased premises was in its said lessor New York Central and Hudson River Railroad Company at the time said lease was executed and delivered; and that the possession of said leased premises was taken over by said original lessee immediately upon the delivery of said lease, and possession of said leased premises was continued by them and their assigns and by the defendant, Ontario Beach Hotel and Amusement Company under their and its rightful claim of

title until the possession thereof was taken over by the City of Rochester for the purposes of a public park on or about the 26th day of April, 1920, subject to the continued ownership of the title in fee of the said lessor and its successors in interest and of the Ontario Beach Hotel and Amusement Company lessee, as will more fully hereinafter be set forth; and that the damages to be awarded to the said Ontario Beach Hotel and Amusement Company are now being judicially ascertained by the commissioners named in the Bill of Complaint, which damages should of right be paid to the said defendant as its indemnity for the taking of its leasehold rights under the power of eminent domain for park purposes by the City of Rochester which is being exercised under the sovereign authority of the State of New York as will more fully hereinafter be set forth.

2. The defendant Ontario Beach Hotel & Amusement Company admits the allegation contained in the bill of complaint to the effect that on February 25, 1908, Homer E. A. Dick, Referee appointed by the Monroe County Court in the State of New York, in a judgment of said court taken in an action to foreclose a mechanic's lien, in which action the defendant, The Upton Company was [fol. 96] plaintiff and the defendant, Ontario Beach Hotel & Amusement Company and others were defendants, executed and delivered to said The Upton Company, a referee's deed in writing purporting to convey a portion of the real property described in the complaint to said, The Upton Company, and that said referee's deed was recorded on the 29th day of February, 1908 in Liber 765 of Deeds at page 27 in the office of the Clerk of the County of Monroe and State of New York. It denies that said deed is a cloud upon any title of the said plaintiff, Commonwealth of Massachusetts, but admits that said deed is in hostility to any right or title which the Commonwealth is asserting in this action in and to any of said lands.

In respect to said deed of said referee to said The Upton Company, this defendant, Ontario Beach Hotel & Amusement Company, alleges that said deed purported to convey a small portion of the premises held under lease by Ontario Beach Hotel & Amusement Company, being a parcel in the northwest corner of said leasehold premises about one hundred and fifty (150) feet by two hundred (200) feet, fronting on Lake Avenue or Broadway, as it is called, and adjoining the lake shore, and that The Upton Company never took possession of said land described in said referee's deed, but said land was at the date of said referee's deed and ever since remained in the possession and control of the defendant, Ontario Beach Hotel & Amusement Company down to the time when possession thereof was taken by the City of Rochester as an incident to the condemnation proceedings described in the complaint in this action; that the Ontario Beach Hotel & [fol. 97] Amusement Company exercised continuous acts of ownership and control over said land covered by said referee's deed with the knowledge and consent of the said The Upton Company, and

that said The Upton Company never intended to assert title to any of said lands as against the Ontario Beach Hotel & Amusement Company, and since the commencement of this action, and on or about April 27, 1923, the said The Upton Company did by formal deed which has been duly recorded in Monroe County Clerk's office, sell, assign, and quit-claim unto the Ontario Beach Hotel & Amusement Company all the right, title, and interest of said The Upton Company in and to any of said lands or premises or leasehold together with all the right, title, and interest of the said The Upton Company in any award or claim for damages or compensation for any of the lands so taken in the condemnation proceedings described in the complaint, and the said Ontario Beach Hotel & Amusement Company is now the owner of all of the rights of said The Upton Company in and to said leasehold premises and in and to any claim for compensation for the lands to be taken for said park purposes which the said, The Upton Company, might otherwise have.

3. Said Ontario Beach Hotel and Amusement Company denies that any portion of the lands described in said lease to which the plaintiff now assets a claim of ownership in the Bill of Complaint was included in the lands or property ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts any [fol. 98] title, right or interest in and to any lands which were under the waters of Lake Ontario when said treaty was made.

It denies that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and denies that the Commonwealth of Massachusetts is the owner or is in possession of said parcel of land; it denies that the commissioners of appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and denies that the plaintiff is the owner of said lands, or any portion thereof; it denies that the lands, for the acquisition of which the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of February, 1920, were a part of the lands of plaintiff, or that the plaintiff had any title to or interest in said lands.

And it further denies upon information and belief the allegation contained in the Bill of Complaint that the plaintiff has brought an action of ejectment in this Court against the defendant the City of Rochester.

4. Said defendant, Ontario Beach Hotel & Amusement Company, alleges that in and by said Treaty of Hartford, the Commonwealth [fol. 99] of Massachusetts ceded, granted and released unto the State

of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

5. Said defendant alleges that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of government sovereignty reserved by and ceded to it, and that the Commonwealth of Massachusetts has had no right or interest in the above described lands, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

6. Thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth had in and to the lands ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians therein. On or about the 8th day of July, 1788, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788.
[fol. 100] The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham, and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

7. Said defendant alleges that if any part of the land described in the complaint now claimed by the plaintiff, was at the date of the Treaty of Hartford, part of the upland or shore of Lake Ontario west of the Genesee River, said portion of the land claimed in the complaint is a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, and that the chain of title thereto passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps to this defendant's lessor, and by said lease to the defendant, Ontario Beach Hotel & Amusement Company and is clear, unimpaired, and unbroken from April 1, 1788 to the present time; but in this respect the said defendant alleges that it is informed and believes the portion

of the premises included in the leasehold held by Ontario Beach Hotel & Amusement Company which is claimed by plaintiff in the Bill of Complaint or the greater part thereof, including the Portion thereof described in the Referee's deed to The Upton Company men- [fol. 101] tioned in the Complaint was under the waters of Lake Ontario at the time the Treaty of Hartford was made and at the time Phelps and Gorham acquired the adjacent upland from the Commonwealth of Massachusetts and from the native Indians, and that said leasehold lands were formed since the date of the Phelps & Gorham purchase by the gradual and natural process of accretion, principally between the years 1829 and 1844, and the lands thus made became part of the lands, property, and estate of the adjacent upland owners, namely Phelps and Gorham or their grantees and successors in title, and became thereby part of the property and real estate of the said predecessors in title of said lessor and of the Ontario Beach Hotel & Amusement Company, and that the title in and to said lands formed by accretion was passed by mesne conveyances from the said true and lawful owners thereof to said Ontario Beach Hotel & Amusement Company and its lessor aforesaid.

8. Said defendant further alleges that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representative on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in the complaint herein.

9. Said defendant further alleges that it is informed and believe that since April 1, 1788, the Commonwealth of Massachusetts has not made or asserted a claim of any nature in or to the lands described in the complaint, or in or to the bed of Lake Ontario adja- [fol. 102] cent, and that since said date, the Commonwealth of Massachusetts has not been in possession of said lands or any part thereof. That during said period of about 130 years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

10. At the date of said lease October 1st, 1883, said Craig and Upton entered into possession of the premises so leased and they and their assigns continued in possession of said premises under said lease until the assignment to said Ontario Beach Hotel and Amusement Company which company took possession of said premises April 24th, 1906, and remained in the sole possession thereof as lessee until April 26th, 1920, when pursuant to the terms of an order of that day made by the Supreme Court of the State of New York, and hereinafter referred to, and by agreement between said City of Rochester and Ontario Beach Hotel and Amusement Company, the City of Rochester took possession of said leased premises pending the maintenance and conclusion of condemnation proceed-

ings instituted by said City of Rochester for the acquiring of said property under the right of eminent domain for the purposes of a public park. That the City of Rochester agreed with said Ontario Beach Hotel and Amusement Company to prosecute said proceedings with reasonable speed in order that the value of the right of said Ontario Beach Hotel and Amusement Company as lessee might be justly determined and its damages paid to it for its rights so taken and appropriated.

11. The State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 [fol. 103] of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. Such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinances duly adopted, declare its intention to acquire in fee simple absolute and did declare that if deemed necessary for park purposes and other municipal purposes the lands described in the complaint herein, including the lands leased by said defendant aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands in said proceedings. On or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the Court should determine, and pursuant to said order and said agreement with said defendant, the said city did enter into possession of the said lands and has ever since been in possession thereof.

12. The said Commissioners of Appraisal, and their successors thereafter appointed, who are defendants in this action, duly quali- [fol. 104] fied and have from time to time taken proofs submitted by this defendant and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to this defendant or other owners of any of said lands.

13. This defendant has not been deprived of its title as lessee to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

14. That by the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and conceded to it has and was accorded in and by said treaty the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished sovereignty and governmental jurisdiction over said lands, comes now as a mere proprietor claiming to own lands in the State of New York, and not in the exercise of any right as a sovereign state with respect to said lands, and therefore should not and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain with respect to said lands, and that the defendant commissioners of appraisal are acting as such pursuant to the sovereign political powers and rights delegated by the legislature of the State of New York to the City of Rochester, and that said defendant Com- [fol. 105] missioners of Appraisal are not exceeding their powers or jurisdiction nor exercising powers not within their cognizance, and that the plaintiff has notice of said condemnation proceedings, has appeared specially therein, and has had and still has full opportunity if it has any interest in said land [which defendant denies] to ask that there be awarded to it compensation by said commissioners for the taking in said condemnation proceedings under the exercise of said power of eminent domain, of any land or any right, title, or interest of any sort therein which the plaintiff may have.

15. That the defendant and its predecessors in title, relying on its and their continued and uninterrupted occupation and ownership of its lands above described and relying upon the fact that no adverse claim thereto or to any part thereof had ever been made, did, during a long term of years and while they were in open and visible occupation thereof under such claim of title, expend large sums of money for taxes thereon which were assessed against defendant and its predecessors in title and did develop and improve said lands and erect many costly structures thereon during a term of upwards of seventy years and down to the time of taking possession of said lands by the said City of Rochester, and that the Commonwealth of Massachusetts, its executives and general assemblies and all its officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth of Massachusetts had full knowledge of the occupation of said premises through all of said years by the said defendant and its predecessors in title, and had full knowledge that said occupants of said lands were claiming title thereto and did stand by in silence, knowing that said improvements were being made and buildings erected and taxes paid and great out- [fol. 106] lays made upon said premises by those claiming ownership thereof throughout said long period of time in good faith and under a claim of title, and said Commonwealth of Massachusetts, its executives, general assemblies and officers so having jurisdiction with reference to its lands and properties, made no claim and gave

no notice of any claim to the said persons, firms and corporations making said improvements and expenditures as aforesaid, including this defendant, Ontario Beach Hotel & Amusement Company, and did thereby encourage the said defendant and those in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did abandon and relinquish and forever waive any claim or right or title in or to any of said lands; and by reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped and is now estopped from making any claim whatsoever in and to any of said lands or in and to any of the moneys payable in damages for the taking thereof under the right of eminent domain by the City of Rochester.

This defendant further alleges that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835, it was enacted and resolved, and ever since the year 1835 the statute and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

[fol. 107] It alleges that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by this defendant, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which the defendant denies), such title and right of action first accrued more than twenty years prior to the commencement of this action, and that the Commonwealth was disseized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by this defendant and its predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was the Commonwealth, or those from whom or through whom it claims, seized or possessed of any part of said lands.

Wherefore, said defendant, Ontario Beach Hotel & Amusement Company prays the judgment of this Court dismissing the Complaint herein with costs in favor of said defendant.

Arthur E. Sutherland, Solicitor for Defendant Ontario Beach Hotel & Amusement Company, Rochester Savings Bank Bldg., Rochester, N. Y.

[fol. 108] *Duly sworn to by Henry F. Marks. Jurat omitted in printing.*

[fol. 109] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF DEFENDANT THE UPTON COMPANY—Filed May 1, 1923

The Upton Company, one of the defendants, by Arthur E. Sutherland, its solicitor, by leave of this Honorable Court makes the following as its answer to the bill of complaint filed against this defendant and others by the Commonwealth of Massachusetts through its Attorney General, saving to the said defendant the benefit of all proper exceptions to said bill of complaint.

1. It admits that on or about February 25, 1908, pursuant to a judgment taken in the County Court of Monroe County in the State of New York for the foreclosure of a mechanic's lien, a certain por-[fol. 110] tion of the leasehold premises covered by the lease of New York Central & Hudson River Railroad Company, dated October 1, 1883, to Craig and Upton and latter assigned to the defendant, Ontario Beach Hotel and Amusement Company, was sold by Homer E. A. Dick as Referee and purchased upon said sale by defendant, The Upton Company, and that said deed was recorded February 29, 1908, in Liber 765 of Deeds at page 27, in the office of the Clerk of the County of Monroe in the State of New York, and that said deed purports to convey a portion of the interest of the lessee, Ontario Beach Hotel and Amusement Co. in premises known as Ontario Beach Park, being a parcel of land in the northwest corner of said Park adjoining Broadway or Lake Avenue, so called.

In this respect, the defendant, The Upton Company, alleges that it never took possession of the land covered by said Referee's Deed, but said land then was and has ever since remained in the possession of the defendant, Ontario Beach Hotel & Amusement Company with the consent of The Upton Company until it was taken over by the City of Rochester in the condemnation proceedings described in the complaint herein, and that the said The Upton Company since the commencement of this action, and on or about the 27th day of April, 1923, quit-claimed and assigned to the said defendant, Ontario Beach Hotel & Amusement Company, all of the right, title, and interest of the said, The Upton Company, in and to said premises, and all of the right, title, and interest or claim of said The Upton Company in and to any award or right of compensation for the taking of any of said lands in the condemnation proceedings instituted by the City of Rochester in the Supreme Court which are described [fol. 111] in the complaint in this action which instrument has been duly recorded in Monroe County Clerk's office and that the said, The Upton Company has, by reason of said transfer and conveyance, no further interest in said lands or in the awards to be made for the taking thereof, or in the subject matter of this action.

2. Further answering said defendant, The Upton Company, denies that the Commonwealth of Massachusetts has any rightful

claim to or title in any portion of the said leased premises, but alleges upon the contrary that the lawful title in fee in and to said leased premises was in the said lessor, New York Central & Hudson River Railroad Company, at the time said lease dated Oct. 1, 1883 was executed and delivered, which is referred to in the bill of complaint, and it denies that any portion of the lands described in said lease to which the plaintiff now claims ownership in the bill of complaint was included in the lands or property ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts any title, right, or interest in or to any lands which were under the water of Lake Ontario when said treaty was made.

It denies that the Commonwealth of Masseachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint; it denies that the commissioners of appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands [fol. 112] and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and denies that the plaintiff is the owner of said lands, or any portion thereof; it denies that the lands, for the acquisition of which, the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of February, 1920, were a part of the lands of plaintiff, or that the plaintiff, had any title to or interest in said lands.

And it further denies upon information and belief that the allegation contained in the Bill of Complaint that the plaintiff has brought an action of ejectment in this Court against the defendant the City of Rochester.

3. Said defendant alleges that in and by said Treaty of Hartford, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

4. Said defendant alleges that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York [fol. 113] under the Treaty of Hartford as an attribute and necessary adjunct of governmental sovereignty reserved by and ceded to it, and that the Commonwealth of Massachusetts has had no right or interest in the above described lands, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

5. Thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth had in and to the lands ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians therein. On or about the 8th day of July, 1788, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Reprsentatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788.

The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham, and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Common-
[fol. 114] wealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

6. Said defendant alleges that if any part of the land described in the complaint now claimed by the plaintiff, was at the date of the Treaty of Hartford, part of the upland or shore of Lake Ontario west of the Genesee River, said portion of the land claimed in the complaint is a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, and that the chain of title thereto passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps to this defendant's lessor, and by said lease to the defendant Ontario Beach Hotel & Amusement Company and is clear, unimpaired, and unbroken from April 1, 1788 to the present time; but in this respect the said defendant alleges that it is informed and believes the portion of the premises included in the leasehold held by Ontario Beach Hotel & Amusement Company which is claimed by plaintiff in the Bill of Complaint or the greater part thereof including the portion thereof described in the Referee's deed to The Upton Company mentioned in the Complaint was under the waters of Lake Ontario at the time the Treaty of Hartford was made and at the time Phelps and Gorham acquired the adjacent upland from the Commonwealth of Massachusetts and from the native Indians, and that said leasehold lands were formed since the date of the Phelps & Gorham purchase by the gradual and natural process of accretion, principally between the years 1829 and 1844, and the lands thus made became part of the lands, property, and estate of the adjacent upland owners, namely Phelps and Gorham or their grantees and successors in
[fol. 115] title, and became thereby part of the property and real estate of the said predecessors in title of said lessor and of the On-

tario Beach Hotel & Amusement Company, and that the title in and to said lands formed by accretion was passed by mesne conveyances from the said true and lawful owners thereof to said Ontario Beach Hotel & Amusement Company and its lessor aforesaid.

7. Said defendant further alleges that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in the complaint herein.

8. Said defendant further alleges that it is informed and believes that since April 1, 1788, the Commonwealth of Massachusetts has not made or asserted a claim of any nature in or to the lands described in the complaint, or in or to the bed of Lake Ontario adjacent, and that since said date, the Commonwealth of Massachusetts has not been in possession of said lands or any part thereof. That during said period of about 130 years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

9. At the date of said lease October 1st, 1883, said Craig and Upton entered into possession of the premises so leased and they and their assigns continued in possession of said premises under [fol. 116] said lease until the assignment to said Ontario Beach Hotel and Amusement Company which company took possession of said premises April 24th, 1906, including the part thereof covered by said Referee's deed, and remained in the sole possession thereof as lessee until April 26th, 1920, when pursuant to the terms of an order of that day made by the Supreme Court of the State of New York, and hereinafter referred to, and by agreement between said City of Rochester and Ontario Beach Hotel and Amusement Company, the City of Rochester took possession of said leased premises pending the maintenance and conclusion of condemnation proceedings instituted by said City of Rochester for the acquiring of said property under the right of eminent domain for the purposes of a public park. That the City of Rochester agreed with said Ontario Beach Hotel and Amusement Company to prosecute said proceedings with reasonable speed in order that the value of the rights of said Ontario Beach Hotel and Amusement Company as lessee might be justly determined and its damages paid to it for its rights so taken and appropriated.

10. The State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. Such Common Council, in the exercise of said delegated

jurisdiction, authority, and right of sovereignty, did, by ordinances duly adopted, declare its intention to acquire in fee simple absolute [fol. 117] and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the complaint herein, including the lands leased by said defendant aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands in said proceedings. On or about April 23, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the Court should determine, and pursuant to said order, the said city did enter into possession of the said lands and has ever since been in possession thereof.

11. The said Commissioners of Appraisal, and their successors thereafter appointed, who are defendants in this action, duly qualified and have from time to time taken proofs submitted by Ontario Beach Hotel & Amusement Co. and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to any owners of any of said lands.

12. None of the parties defendant have been deprived of title to said lands by said condemnation proceedings and the City of [fol. 118] Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

13. That by the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and conceded to it has and was accorded in and by said treaty the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished sovereignty and governmental jurisdiction over said lands, comes now as a mere proprietor claiming to own lands in the State of New York, and not in the exercise of any right as a sovereign state with respect to said lands, and therefore should not and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain with respect to said lands, and that the defendant commissioners of appraisal are acting as such pursuant to the sovereign political powers and rights delegated by the legislature of the State of New York to the City of Rochester, and that said defendant Commissioners of Appraisal are not exceeding their powers or jurisdiction nor exercising powers not within their cog-

nizance, and that the plaintiff has notice of said condemnation proceedings, has appeared specially therein, and has had and still has full opportunity if it has any interest in said land [which defendant denies] to ask that there be awarded to it compensation by said commissioners for the taking in said condemnation proceedings under the exercise of said power of eminent domain, of any land or any right, title, or interest of any sort therein which the plaintiff may have.

[fol. 119] 14. That the lessee Ontario Beach Hotel Amusement Co. and its predecessors in title, relying on its and their continued and uninterrupted occupation and ownership of its lands above described and relying upon the fact that no adverse claim thereto or to any part thereof had ever been made, did, during a long term of years and while they were in open and visible occupation thereof under such claim of title, expend large sums of money for taxes thereon which were assessed against said defendant and its predecessors in title and did develop and improve said lands and erect many costly structures thereon during a term of upwards of seventy years and down to the time of taking possession of said lands by the said City of Rochester, and that the Commonwealth of Massachusetts, its executives and general assemblies and all its officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth of Massachusetts had full knowledge of the occupation of said premises through all of said years by the said defendant and its predecessors in title, and had full knowledge that said occupants of said lands were claiming title thereto and did stand by in silence, knowing that said improvements were being made and buildings erected and taxes paid and great outlays made upon said premises by those claiming ownership thereof throughout said long period of time in good faith and under a claim of title, and said Commonwealth of Massachusetts, its executives, general assemblies and officers so having jurisdiction with reference to its lands and properties, made no claim and gave no notice of any claim to the said person, firms and corporations making said improvements and expenditures as aforesaid, including said defendant, Ontario Beach Hotel & Amusement Company, and did thereby encourage the said defendant and those in posses-[fol. 120] sion to continue said expenditures and improvements, and said Commonwealth of Massachusetts did abandon and relinquish and forever waive any claim or right or title in or to any of said lands; and by reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped and is now estopped from making any claim whatsoever in and to any of said lands or in and to any of the moneys payable in damages for the taking thereof under the right of eminent domain by the City of Rochester.

15. This defendant further alleges that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835, it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massa-

chusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

It alleges that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by this defendant, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which the defendant denies), such title and right of action first accrued more than twenty years prior to the commence-[fol. 121] ment of this action, and that the Commonwealth was disseized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by the defendant, Ontario Beach Hotel and Amusement Co. and its predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was the Commonwealth, or those from whom or through whom it claims, seized or possessed of any part of said lands.

Wherefore said defendant prays the judgment of this Court dismissing the Complaint herein with costs in favor of said defendant.

Arthur E. Sutherland, Solicitor for Defendant The Upton Company, Rochester Savings Bank Bldg., Rochester, N. Y.

[fol. 122] *Duly sworn to by Wm. C. Fredericks. Jurat omitted in printing.*

[fol. 123] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

[fol 124] AMENDED ANSWER OF DEFENDANT BARTHOLOMAY COMPANY, INC.—Filed November 30, 1923

Bartholomay Company, Inc., sued herein as Bartholomay Brewing Company, by Clarence P. Moser, its Solicitor, by leave of this Honorable Court, for its amended answer to the Bill of Complaint herein avers as follows, saving to itself the benefit of all proper exceptions to said Bill of Complaint:

1. Upon information and belief, it denies the allegation contained in the Bill of Complaint herein that the plaintiff has brought

an action of ejectment in this Court aginst the defendant, The City of Rochester; it denies that, by the terms of the Hartford Treaty, the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; it denies that the lands described in the Bill of Complaint herein, of which the plaintiff claims to be the owner, were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty; it denies that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and denies that the Commonwealth of Massachusetts is the owner or is in possession of said parcel of land; it denies that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by The City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners [fol. 125] of the lands and denies that the plaintiff is the owner of said lands, or any portion thereof; it denies that the lands, for the acquisition of which the Common Council of The City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

2. It alleges that it is the owner and holder of the record title to the following described land, located in the Twenty-third Ward in the City of Rochester, by deed from Edward Harris and wife to Bartholomay Brewery Company, dated May 29, 1889, recorded in Liber 450 of Deeds, at page 331, in the Office of the Clerk of Monroe County, New York; by deed from the New York Central Railroad Company to Bartholomay Brewing Company, dated April 17, 1915, and recorded in Liber 968 of Deeds, at page 246, in the Office of the Clerk of Monroe County, New York; and by deed from the New York State Realty & Terminal Company to Bartholomay Brewery Company, dated August 17, 1915, and recorded in Liber 968 of Deeds, at page 248 in the Office of the Clerk of Monroe County, New York:

Beginning at the intersection of the center line of Beach Avenue with he westerly line of Lake Avenue; running thence northerly along said westerly line of Lake Avenue to the shore of Lake Ontario; thence westerly along the shore of Lake Ontario, five hundred and ninety (590) feet to the westerly line of the premises described in the Bill of Complaint herein; thence southerly along the westerly line of the premises described in the Bill of Complaint herein, parallel to the westerly line of Lake Avenue, to the center [fol. 126] line of Beach Avenue; thence easterly along said center line of Beach Avenue, eighty-two and seventy-seven hundredths (82.77) feet; thence north and parallel with said westerly line of

Lake Avenue one hundred seventeen and forty-eight hundredths (117.48) feet; thence easterly at right angles with said last-described line, one hundred (100) feet; thence southerly on a line parallel with said easterly line of Lake Avenue one hundred forty-four and four one-hundredths (144.04) feet to the center line of Beach Avenue; thence easterly along said center line of Beach Avenue four hundred twenty-four and thirty-three hundredths (424.33) feet to the place of beginning.

all of which premises, except the portion thereof south of the north line of Beach Avenue, are included within the description of lands set forth in the Bill of Complaint herein, of which the plaintiff claims to be the owner. The name of the said Bartholomay Brewery Company was duly changed to Bartholomay Company, Inc., July 9, 1919. And this defendant denies that the said deeds above described or that any of the deeds or conveyances described in Paragraph III, Part D, of the Bill of Complaint herein, described and conveyed any property of the plaintiff, the Commonwealth of Massachusetts or that they tend to make the real property described in the Bill of Complaint unmarketable or create a cloud upon or defect in the title thereto, and denies that at the time of the making of the said deeds or conveyances, or any of them, or any time prior thereto, the plaintiff, the Commonwealth of Massachusetts, was the owner of or had any right, title or interest in and to the real property described in and conveyed thereby.

[fol. 127] 3. This defendant further alleges that, on or about the first day of July, 1919, it entered into an agreement with the City of Rochester, whereby defendant surrendered and delivered to the City of Rochester the possession of its lands, and whereby the City of Rochester agreed to institute condemnation proceedings, under the right of eminent domain of the State of New York, for the purpose of securing the full legal title to the said lands and to prosecute said proceedings with all convenient speed and to pay to the owner of said lands the amount awarded in the final report of the Commissioners appointed, in accordance with the provisions of law, together with interest at the rate of six per cent. per annum on the full amount of said award from July 1, 1919, to the date of the payment of said award.

4. This defendant further alleges that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public purposes, and such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal pur-

poses the lands described in the Bill of Complaint herein, including the lands owned by his defendant aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands and, on or about April 26, 1929, an order was duly made [fol. 128] by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards, when made, in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said city did enter into possession of the said lands and has ever since been in possession thereof.

5. This defendant further alleges that the said commissioners of appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by this defendant and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to this defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said commissioners of appraisal and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the commissioners of appraisal.

6. This defendant further alleges that it was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by [fol. 129] the commissioners of appraisal.

7. This defendant further alleges that, in and by the Treaty of Hartford, referred to in the Bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government, sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of the government, sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

8. This defendant further alleges that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts

had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto that, on or about the 8th day of July, 1788, by the treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase [fol. 130] were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title of the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the record on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

9. This defendant further alleges that the lands above described and owned by it are a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, or were formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said lands, title to which accrued to said Phelps and Gorham and their successors in title as owners of the uplands, and that the chain of title in and to its said lands passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps and their successors to this defendant and is clear, unimpaired and unbroken from April 1st, 1788, to the present time; that this defendant and its predecessors in title were in actual, continuous and uninterrupted possession of said lands from the 1st day of April, 1788, until the possession thereof was surrendered to the City of Rochester, as hereinbefore alleged.

10. This defendant further alleges that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and that the Commmonwealth of Massachusetts has had no right [fol. 131] or interest in the above-described lands of this defendant, nor in the lands under the waters of Lake Ontario since the 16th day of December, 1786.

11. This defendant further alleges, upon information and belief, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

12. This defendant further alleges that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives

on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

13. This defendant further alleges, upon information and belief, that after April 1, 1788, and prior to the month of December, 1920, the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788, the Commonwealth of Massachusetts has not been in possession of said lands or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

14. This defendant further alleges that it and its predecessors in title, relying on its and their continued and uninterrupted possession and ownership and its said land above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open, visible and uninterrupted oc-[fol. 132] cupation thereof under claim of title, did expend large sums of money for taxes thereon which were assessed against this defendant and its predecessors in title, and did develop and improve said lands and erect many costly structures thereon during the term of upwards of seventy years and down to the time of taking of possession of said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers, having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by this defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto, and knowing that said improvements were being made, and moneys expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim or interest in said lands to this defendant and its predecessors in title, and by their silence and acquiescence and failure to assert title, encouraged this defendant and its predecessors in title, while in possession, to continue said expenditures and improvements, and said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to, abandon and relinquish and forever waive any interest or claim or right or title in or to any of said lands.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped from making any claim whatsoever in and to any of said lands, or in and to any

of the moneys payable as awards for the taking thereof, under the right of eminent domain, by the City of Rochester.

15. This defendant further alleges that by the term of the Treaty [fol. 133] of Hartford, the State of New York, as an attribute of the sovereignty and jurisdiction retained by and ceded to it, has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester, as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign State, and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

16. This defendant further alleges that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835, it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

It alleges that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by this defendant, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which the defendant denies), such title and right of action first accrued more than twenty years prior to the commencement of this action, and that the Commonwealth was disseized of said premises more than [fol. 134] twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by this defendant and its predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was the Commonwealth, or those from whom or through whom its claims, seized or possessed of any part of said lands.

Wherefore, This defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

Clarence P. Moser, Solicitor for Bartholomay Company, Inc.,
31 Exchange Street, Rochester, N. Y.

Duly sworn to by Sandys B. Foster. Jurat omitted in printing.

[fol. 135] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

AMENDED ANSWER OF DEFENDANT CENTRAL UNION TRUST COMPANY OF NEW YORK—Filed December 3, 1923

[fol. 136] Central Union Trust Company of New York, by Daniel M. Beach, its solicitor, by leave of this Honorable Court, submits the following as its amended answer to the original Bill of Complaint filed against this defendant by the Commonwealth of Massachusetts through its Attorney General, saving to itself the benefit of all proper exceptions to said Bill of Complaint.

1. It admits that The New York Central Railroad Company is a corporation formed and existing under and by virtue of the Laws of the State of New York, and was formed by the consolidation of several railroad companies, among which were the corporations formerly known as The New York Central & Hudson River Railroad Company, the Windsor Beach & Ontario Railroad Company and the Rome, Watertown & Ogdensburgh Railroad Company, and is the owner of the properties formerly owned by said companies.

2. It alleges that the defendant The New York Central Railroad Company is the owner and holder of the record title to the lands now in the City of Rochester, Monroe County, New York, which were conveyed by one Patrick Manrow and Mary Manrow, his wife, to said New York Central & Hudson River Railroad Company by deed dated May 31st, 1881, recorded in the office of the Clerk of the County of Monroe in Liber 341 of Deeds at Page 347, and briefly described as bounded on the north by Lake Ontario, on the east by the westerly line of the pier owned by the United States of America on the west bank of the Genesee River, on the south by Beach Avenue and on the west by Broadway (Lake Avenue), and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

[fol. 137] It alleges that said The New York Central Railroad Company is the owner and holder of the record title to the lands now in said City of Rochester, New York, which were conveyed by one Martha McIntyre to the Rome, Watertown & Ogdensburgh Railroad Company by deed dated April 27th, 1888, recorded in said Clerk's Office in Liber 440 of Deeds at Page 12, briefly described as a lot on the north side of Beach Avenue thirty feet in width and one hundred seventy-three feet in depth in original lot No. 20, and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

3. It admits that this defendant Central Union Trust Company of New York is a corporation organized and existing under and by virtue of the Laws of the State of New York and was formed by the consolidation of the Central Trust Company of New York and the

Union Trust Company of New York, and has succeeded to and acquired all the property of said Central Trust Compnay of New York.

It is true that on the 1st day of June, 1897 the said New York Central & Hudson River Railroad Company executed and delivered to said Central Trust Company of New York as Trustee a mortgage which conveyed with other real property certain parts of the premises above described, and that on or about the 16th day of April, 1913, the same company executed and delivered to said mortgagee a supplemental mortgage which conveyed with other real property certain parts of said premises of the defendant The New York Central Railroad Company. It admits and alleges that said original mortgage and supplemental mortgage were duly recorded in the office of the clerk of the County of Monroe, New York and are existing and valid [fol. 138] liens upon the said lands of the defendant The New York Central Railroad Company and that this defendant is acting as Trustee under the provisions thereof.

4. Upon information and belief it denies that any of the deeds or conveyances described in paragraph III, part D, of the Bill of Complaint herein, described and conveyed or purported to convey any property of the plaintiff, the Commonwealth of Massachusetts, or that they tend to make the real property described in the Bill of Complaint unmarketable, or creates a cloud upon or a defect in the title thereto, and denies that at the time of the making of said deeds or conveyances, or any of them, or at any time prior thereto, the plaintiff, the Commonwealth of Massachusetts, had any right, title or interest in and to the real property described in and conveyed thereby.

5. Upon information and belief it denies the allegations contained in the Bill of Complaint herein that the pailntiff has brought an action of ejectment in this court against the defendant, the City of Rochester.

6. It admits that a controversy arose between the State of New York and the plaintiff over conflicting claims to lands in western New York, which claims were settled and determined by the Treaty of Hartford on the 16th day of December, 1786, as alleged in the Bill of Complaint, and that said Treaty was filed and recorded [fol. 139] in the public offices of the State of New York and of the Commonwealth of Massachusetts.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario.

It denies upon information and belief that the lands described in the Bill of Complaint herein of which the plaintiff claims to be the owner were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty; that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and that the said Commonwealth of Massachusetts is the owner or is in possession of said parcel of land.

7. It denies upon information and belief that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor should be paid to parties other than the rightful owners of the land; that the plaintiff is the owner of said lands or any portion thereof and that the lands for the acquisition of which the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, on the 13th day of May, 1919, and on the 10th [fol. 140] day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

8. This defendant upon information and belief further alleges that shortly prior to the 26th day of April, 1920, the defendant, the New York Central Railroad Company, entered into an agreement with the City of Rochester whereby said defendant surrendered and delivered to the City of Rochester possession of its lands hereinabove described and whereby the City of Rochester agreed to institute condemnation proceedings under the right of eminent domain of the State of New York for the purpose of securing the full legal title to the said lands of said defendant, and to prosecute said proceedings with all convenient speed, and pay the amount awarded by the final report of the Commissioners appointed in accordance with the provisions of law, together with interest thereon.

9. This defendant further alleges upon information and belief that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. That said Common Council, in the exercise of said delegated jurisdiction, authority and right of sovereignty, did by ordinance duly adopted, declare its intention to acquire in fee simple [fol. 141] absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the said lands owned by the defendant, The New York Central Railroad Company. That the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands, and on or about April 28, 1920, an order was duly made by the Supreme Court in said proceedings appointing three Commissioners of Appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of

said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said City did enter into possession of the said lands and has ever since been in possession thereof.

10. This defendant further alleges upon information and belief that the said Commissioners of Appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by the defendant, The New York Central Railroad Company, and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to said defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of [fol. 142] the hearings before the said Commissioners of Appraisal, and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the Commissioners of Appraisal.

11. It further alleges that said The New York Central Railroad Company was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

12. It alleges that, in and by the Treaty of Hartford, referred to in the bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

13. It further alleges upon information and belief that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the [fol. 143] said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto; that, on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek,

said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

14. This defendant further alleges upon information and belief that that part of the lands of the defendant The New York Central Railroad Company above described which was upland, or land out of water in 1788, was included in the Phelps & Gorham purchase, but that the greater part of the said lands of said defendant was not then out of water, but since 1788 and largely before the year 1844 was formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said upland.

[fol. 144] That the title to said land so formed by accretion accrued to said Phelps & Gorham and their successors in title as owners of the upland, and that the chain of title to all of said lands of the defendant The New York Central Railroad Company passed by mesne conveyances from said Phelps & Gorham and their successors to said defendant, and is clear, unimpaired and unbroken from April 1st, 1788, to the present time.

That said defendant Railroad Company and its predecessors in title were in actual, continuous and uninterrupted possession of said lands from the 1st day of April, 1788, until possession was surrendered to the City of Rochester as hereinbefore alleged.

15. The bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and the Commonwealth of Massachusetts has had no right or interest in the above described lands of The New York Central Railroad Company, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

16. This defendant alleges upon information that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

17. It further alleges, upon information and belief, that the Commonwealth of Massachusetts by a resolve of its Senate and House

of Representatives on June 20, 1792, and by action of its Superin- [fol. 145] tendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

18. This defendant further alleges, upon information and belief, that after April 1, 1788, and prior to the month of December, 1920, the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788, the Commonwealth of Massachusetts has not been in possession of said lands or of the bed of Lake Ontario or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

19. As a further answer and defense this defendant alleges upon information and belief that the defendant, New York Central Railroad Company, and its predecessors in title relying on its and their continued and uninterrupted possession and ownership of its said lands above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open and visible occupation thereof under claim of title did expend large sums of money for taxes thereon which were assessed against said defendant railroad company and its predecessors in title, and did develop and improve said lands and erect many costly struc- [fol. 146] tures thereon during the term of upwards of seventy years and down to the time of the taking possession of said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by said defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto; that knowing said improvements were being made, and moneys expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim or interest in said lands to anyone, and by their silence and acquiescence and failure to assert title, encouraged said defendant Railroad Company and its predecessors in title while in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to and by its grants and conveyances of said lands abandon and relinquish and forever waive any claim or any right or title therein or thereto.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped from making

any claim whatsoever in and to any of the lands described in the Bill of Complaint or in and to any of the money payable as awards for the taking thereof under the right of eminent domain by the City of Rochester.

20. This defendant relying upon the long continued and unin- [fol. 147] terrupted possession and ownership of said lands by the defendant The New York Central Railroad Company and its predecessors, and upon the record title of said railroad company thereto, and upon the fact that no adverse claim of interest therein had been made by said Commonwealth of Masschusetts, accepted said mortgages above described and the obligations therein imposed upon it, and qualified and is now acting as trustee thereof.

That the said Commonwealth of Massachusetts having failed to assert title or to give notice thereof for a period of upwards of one hundred thirty years, induced this defendant to accept said mortgages, and said Commonwealth of Massachusetts did become and is now estopped from making any claim whatsoever in and to any of said lands of said defendant The New York Central Railroad Company, or to assert any claim therein adverse to the interests of this defendant as Trustee.

21. By the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and ceded to it has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign state, and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

22. This defendant further alleges that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the [fol. 148] year 1835, it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

It alleges that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by this defendant, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which the defendant denies), such title and right of action first accrued more than twenty years prior to the commencement of this

action, and that the Commonwealth was dis-seized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by this defendant and its predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this [fol. 149] action was the Commonwealth, or those from whom or through whom it claims, seized or possessed of any part of said lands.

Wherefore, this defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

Daniel M. Beach, Solicitor for Central Union Trust Company of New York, 15 Rochester Savings Bank Building, Rochester, N. Y.

Duly sworn to by Daniel M. Beach. Jurat omitted in printing.

[fol. 150] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

AMENDED ANSWER OF DEFENDANT THE NEW YORK CENTRAL RAILROAD COMPANY—Filed December 3, 1923

[fol. 151] The New York Central Railroad Company, by Daniel M. Beach, its solicitor, by leave of this Honorable Court, submits the following as its amended answer to the original Bill of Complaint filed against this defendant by the Commonwealth of Massachusetts through its Attorney General, saving to itself the benefit of all proper exceptions to said Bill of Complaint.

1. It admits that The New York Central Railroad Company is a corporation formed and existing under and by virtue of the Laws of the State of New York, and was formed by the consolidation of several railroad companies, among which were the corporations formerly known as The New York Central & Hudson River Railroad Company, the Windsor Beach & Ontario Railroad Company and the Rome, Watertown & Ogdensburgh Railroad Company, and that it is the owner of the properties formerly owned by said companies.

2. It alleges that it is the owner and holder of the record title to the lands now in the City of Rochester, Monroe County, New York, which were conveyed by one Patrick Manrow and Mary Manrow, his wife, to said New York Central & Hudson River Railroad Company by deed dated May 31st, 1881, recorded in the office of the Clerk of the County of Monroe in Liber 341 of Deeds at Page 347, and briefly described as bounded on the north by Lake Ontario, on the

east by the westerly line of the pier owned by the United States of America on the west bank of the Genesee River, on the south by Beach Avenue and on the west by Broadway (Lake Avenue), and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

[fol. 152] It alleges that it is the owner and holder of the record title to the lands now in said City of Rochester, New York, which were conveyed by one Martha McIntyre to the Rome, Watertown & Ogdensburgh Railroad Company by deed dated April 27th, 1888, recorded in said Clerk's Office in Liber 440 of Deeds at Page 12, briefly described as a lot on the north side of Beach Avenue thirty feet in width and one hundred seventy-three feet in depth in original lot No. 20, and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

3. It admits that the defendant Central Union Trust Company of New York is a corporation organized and existing under and by virtue of the Laws of the State of New York and was formed by the consolidation of the Central Trust Company of New York and the Union Trust Company of New York, and has succeeded to and acquired all the property of said Central Trust Company of New York.

It is true that on the 1st day of June, 1897 the said New York Central & Hudson River Railroad Company executed and delivered to said Central Trust Company of New York as Trustee a mortgage which conveyed with other real property certain parts of the premises of the defendant above described, and that on or about the 16th day of April, 1913, the same company executed and delivered to said mortgagee a supplemental mortgage which conveyed with other real property certain parts of said premises of this defendant above described. It admits and alleges that said original mortgage and supplemental mortgage were duly recorded in the office of the Clerk of the County of Monroe, New York and are existing and valid [fol. 153] liens upon the said lands of this defendant and that defendant, Central Union Trust Company is acting as Trustee under the provisions thereof.

4. It admits that on or about the 1st day of October, 1883, said New York Central & Hudson River Railroad Company executed and thereafter delivered to one Henry H. Craig and Levi M. Upton a lease conveying a part of said premises above described for the term of fifty years, and that said lease was thereafter duly assigned to and is now the property of the defendant Ontario Beach Hotel & Amusement Company; that on or about the 25th day of April, 1916, it executed and delivered to the defendant, Emil Boshart a deed to a part of the real proerty described in and claimed by the plaintiff in the Bill of Complaint herein, and that on or about the 17th day of April, 1915, it executed and delivered to the defendant, Bartholomay Brewing Company now Bartholomay Company, Inc., a deed to a part of the property described in and claimed by the plaintiff in the Bill of Complaint herein.

It denies that said deeds and mortgages above described, or that any of the deeds or conveyances described in paragraph III, part D, of the Bill of Complaint herein, described and conveyed any property of the plaintiff, the Commonwealth of Massachusetts, or that they tend to make the real property described in the Bill of Complaint unmarketable, or create a cloud upon or a defect in the title thereto, and denies that at the time of the making of said deeds or conveyances, or any of them, or at any time prior thereto, the plaintiff, the Commonwealth of Massachusetts, had any right, title or interest in and to the real property described in and conveyed thereby.

[fol. 154] 5. Upon information and belief it denies the allegations contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this court against the defendant, the City of Rochester.

6. It admits that a controversy arose between the State of New York and the plaintiff over conflicting claims to lands in western New York, which claims were settled and determined by the Treaty of Hartford on the 16th day of December, 1786, as alleged in the Bill of Complaint, and that said Treaty was filed and recorded in the public offices of the State of New York and of the Commonwealth of Massachusetts.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; that the lands described in the Bill of Complaint herein of which the plaintiff claims to be the owner were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty and that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and further denies that the said Commonwealth of Massachusetts is the owner or is in possession of said parcel of land.

7. It denies that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by [fol. 155] being deprived thereof, and the amount of compensation which they shall severally receive therefor should be paid to parties other than the rightful owners of the lands, and denies that the plaintiff is the owner of said lands or any portion thereof.

It denies that the lands for the acquisition of which the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, on the 13th day of May, 1919 and on the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

8. This defendant alleges that shortly prior to the 26th day of April, 1920, it entered into an agreement with the City of Rochester whereby it surrendered and delivered to the City of Roch-

ester possession of its lands hereinabove described and whereby the City of Rochester agreed to institute condemnation proceedings under the right of eminent domain of the State of New York for the purpose of securing the full legal title to the said lands of this defendant, and to prosecute said proceedings with all convenient speed, and pay the amount awarded by the final report of the Commissioners appointed in accordance with the provisions of law, together with interest thereon.

9. This defendant further alleges that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction [fol. 156] of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. That said Common Council, in the exercise of said delegated jurisdiction, authority and right of sovereignty, did by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the lands owned by this defendant aforesaid. That the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands, and on or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three Commissioners of Appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said City did enter into possession of the said lands and has ever since been in possession thereof.

10. The said Commissioners of Appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by this defendant and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to [fol. 157] this defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said Commissioners of Appraisal, and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the Commissioners of Appraisal.

11. This defendant further alleges that it was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commisioners of Appraisal.

12. It alleges that, in and by the Treaty of Hartford, referred to in the bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

13. This defendant further alleges upon information and belief that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and [fol. 158] Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto; that, on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

14. This defendant further alleges upon information and belief that that part of the lands of this defendant above described which was upland, or land out of water in 1788, if any, was included in the Phelps & Gorham purchase, but that the greater part of the said lands of this defendant was not then out of water, and since 1788 and [fol. 159] largely before the year 1844 was formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said upland.

That the title to said land so formed by accretion accrued to said Phelps & Gorham and their successors in title as owners of the upland, and that the chain of title to all of said lands of this defendant passed by mesne conveyances from said Phelps & Gorham and their successors to this defendant, and is clear, unimpaired and unbroken from April 1st, 1788, to the present time.

15. That this defendant and its predecessors in title were in actual, continuous and uninterrupted possession of said lands of this defendant hereinabove described from the 1st day of April, 1788, until possession thereof was surrendered to the City of Rochester as hereinbefore alleged.

The bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and the Commonwealth of Massachusetts has had no right or interest in the above described lands of this defendant, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

16. This defendant further shows upon information, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

[fol. 160] 17. It alleges, upon information, that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

18. Further answering this defendant alleges, upon information and belief, that after April 1, 1788 and prior to the month of December, 1920 the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788 the Commonwealth of Massachusetts has not been in possession of said lands, or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

This defendant and its predecessors in title relying on its and their continued and uninterrupted possession and ownership of its said lands above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open and visible occupation thereof under claim of title did expend large sums of money for taxes thereon which were assessed against this defendant and its predecessors in title, and did develop [fol. 161] and improve said lands and erect many costly structures

thereon during the term of upwards of seventy years and down to the time of the taking of possession of said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by this defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto; that knowing said improvements were being made, and moneys were being expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim or interest in said lands to this defendant and its predecessors in title, and by their silence and acquiescence and failure to assert title, encouraged this defendant and its predecessors in title while in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to and by its grants and conveyances of said lands abandon and relinquish and forever waive any claim or right or title therein or thereto.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped from making any claim whatsoever in and to any of said lands, or in and to any of the money payable as awards for the taking thereof under the right of eminent domain by the City of Rochester.

20. This defendant relying upon the long continued and uninter- [fol. 162] rupted possession and ownership of said lands by it and its predecessors, and upon its record title thereto, and upon the fact that no adverse claim of interest therein had been made by said Commonwealth of Massachusetts, executed and delivered said mortgages above described to the defendant Central Union Trust Company of New York.

That said Commonwealth of Massachusetts having failed to give notice or claim of its alleged interest in said lands, and having failed to assert title or to give notice thereof for a period of upwards of one hundred thirty years, induced this defendant to execute and deliver said mortgages, and said Commonwealth of Massachusetts did thereby and by its said public acts become estopped and is now estopped from making any claim whatsoever in and to any of said lands of this defendant, or to assert any claim therein adverse to the interests of the defendant Central Union Trust Company of New York as Trustee.

21. By the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and ceded to it has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign state, and cannot be heard on its application for a

writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

[fol. 163] 22. This defendant further alleges that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835, it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

It alleges that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by this defendant, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which the defendant denies), such title and right of action first accrued more than twenty years prior to the commencement of this action, and that the Commonwealth was disseized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by this defendant and its predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was [fol. 164] the Commonwealth, or those from whom or through whom it claims, seized or possessed of any part of said lands.

Wherefore, this defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

Daniel M. Beach, Solicitor for the New York Central Railroad Company, 15 Rochester Savings Bank Building, Rochester, N. Y.

Duly sworn to by Daniel M. Beach. Jurat omitted in printing.

[fol. 165] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

OBJECTIONS AND EXCEPTIONS OF THE COMMONWEALTH TO THE ADVISORY REPORT OF THE SPECIAL MASTER—Filed December 17, 1925

Now comes the Commonwealth of Massachusetts and objects and excepts:

(1) To the advisory ruling of the Special Master that the Hartford Treaty did not convey to Massachusetts title to any part of the bed of Lake Ontario.

(2) To the refusal of the Special Master to rule that the Hartford Treaty conveyed to Massachusetts title to that part of the bed of Lake Ontario lying south of the International boundary and between the eastern and western boundaries defined by said Treaty.

(3) To the advisory ruling that Massachusetts bounded the tract conveyed by it to Phelps and Gorham upon the water's edge of Lake Ontario.

(4) To the refusal of the Master to rule that Statute 1788, chapter 23, approved November 21, 1788, bounded the lands thereby conveyed to Phelps and Gorham upon the shore or beach of Lake Ontario and not upon the water's edge.

(5) To the advisory ruling that the Deed from the five nations to Gorham and Phelps dated July 8, 1788, bounded the tract thereby [fol. 166] conveyed to Gorham and Phelps upon the water's edge of Lake Ontario.

(6) To the refusal of the Master to rule that the Deed from the five nations to Gorham and Phelps dated July 8, 1788, bounded the lands thereby conveyed upon the shore or beach and not upon the water's edge of Lake Ontario.

(7) To the advisory ruling that defendants are entitled to accretions.

(8) To the refusal of the Master to rule that the defendatns are not entitled to accretions.

(9) To the advisory ruling that the Commonwealth is not entitled to accretions.

(10) To the refusal of the Master to rule that the Commonwealth is entitled to accretions.

(11) To the advisory ruling that the Commonwealth has no title to the parcel of land claimed and described in the Bill of Complaint.

(12) To the refusal of the Master to rule and find that the Commonwealth has title to the parcel of land claimed and described in the Bill of Complaint.

(13) To that portion of the first conclusion beginning upon page (59) at the eleventh line and reading as follows:

When, therefore, Massachusetts ceded to New York all that claim, right and title which the Commonwealth had to the "government sovereignty and jurisdiction" of all the land and all the territory without ex eption, there was a manifest intent to convey what sovereignty implied and that would be the right to the navigable waters and the navigable lakes and the soil beneath the waters. Was this

grant taken away, or exception made to it, as to the part of Lake [fol. 167] Ontario included in the bounds of that tract conveyed to Massachusetts? The conveyance of that tract expressly reserved to New York the right and title of government, sovereignty and jurisdiction. Here, again, the words must be taken to include what the title of government, sovereignty and jurisdiction signified and therefore the exception must imply a reservation of the right to the Navigable lake and the soil underneath the water.

(14) To that portion of the first conclusion beginning upon page (59) at the second line from the bottom to the end of said conclusion at the seventeenth line upon page (61):

It follows from these considerations that the Treaty of Hartford is to be interpreted as granting to Massachusetts the territory described except the right to the navigable lake and the soil beneath the water.

This interpretation is the natural one in view of the situation, the purposes apparent from the deed, and the object sought to be accomplished. The conveyancers plainly had in mind the cession to Massachusetts of a vast tract largely wilderness, but regarded as valuable, to be held by Massachusetts as proprietary owner but only for the purpose of realizing money from its sale, and to be sold so as ultimately to bring settlers who would be citizens under the jurisdiction and sovereignty of the State of New York. The property was to be sold and Massachusetts had the right to sell to private in- [fol. 168] lividuals. Plainly, it was not contemplated that such private individuals, citizens of New York, would get by grant from Massachusetts the right to the bed of Lake Ontario, cutting off part of the prerogative of New York as sovereign. The parties did not contemplate the soil under the waters of Lake Ontario as a part of the marketable lands which would be of value to Massachusetts in the division between the two States. They were thinking of the soil that could be sold, as shown by the very words used; they were thinking primarily of that land "the right of the pre-emption of the soil" of which could be obtained from the Indians. It does not appear that the Indians had, or claimed to have, any rights to the soil under Lake Ontario. This right of preemption of the soil from the Indians was primarily what was conveyed and the general words added; "and all other the estate, right, title and property" were carefully limited by excepting the right of government, sovereignty and jurisdiction.

Bearing in mind that the lands were given to Massachusetts for the purpose of sale to private individuals and settlers, there was no valuable object to be accomplished, nor consideration to be given, by granting Massachusetts the ownership of the bed of the lake without any government, sovereignty or jurisdiction over it. If any such object could be conceived, in line with the general purpose of [fol. 169] the transaction, it would be that ownership of the bed might in some way secure to Massachusetts and her citizens the right to use the waters of the lake. But this subject was particularly

dealt with in the treaty, in Article VI, and the precise object sought was expressed, and that was that "citizens of the Commonwealth of Massachusetts shall at all times have and enjoy the same and equal rights respecting the navigation and fishery on and in Lake Ontario and Lake Erie and the waters communicating from the one to the other * * * as shall from time to time be had and enjoyed by the Citizens of the State of New York."

The view, therefore, of the treaty, is that the specific description and boundary of the tract conveyed to Massachusetts, giving the northern line as in the middle of Lake Ontario but excepting sovereignty and jurisdiction, did not carry with it title to any part of the bed of the lake.

(15) To the final paragraph of the first conclusion upon page (61) reading as follows:

The view, therefore, of the treaty, is that the specific description and boundary of the tract conveyed to Masachusetts, giving the northern line as in the middle of Lake Ontario but excepting sovereignty and jurisdiction, did not carry with it title to any part of the bed of the lake.

[fol. 170] (16) To that portion of the second conclusion beginning at page (63), line fifteen, to and including page (64) line two:

Here again, the question is one of interpretation of the instrument so as to ascertain the intent of the parties. In ascertaining this intent it is helpful to consider the nature of the grant, and the consequence of the interpretation insisted on by Massachusetts. The territory conveyed was an enormous area containing more than two million acres and about 45 miles wide and 90 miles long, reaching across the State of New York from the lake to the Pennsylvania line. It bordered on the lake a distance of over forty miles. It is evident from documents on file that it was sold by Massachusetts for future development, and it is obvious that the use of the shore of Lake Ontario would be of extreme value to the future settlers for transportation, hunting and fishing, landing places, etc., and that access to the water would be essential to development. On the other hand, no benefit whatever to Massachusetts can be observed in the reservation to the Commonwealth, as proprietary owner, of some undefined strip of ground on this particular portion of Lake Ontario, cutting off the grantees of Massachusetts from access to the water. Is such intent to retain a strip of land along the shore of Lake Ontario, necessarily to be deduced from the language of the deed, [fol. 171] because the words "to the shore" instead of the words "to the lake" are used in the description? It seems clear that it is not.

(17) To that portion of the second conclusion beginning at page (65), line eleven, and continuing to the end of said conclusion upon page (72).

(18) To the concluding paragraph of the second conclusion on page (72) reading as follows:

The conclusion is that the words "to the shore" and "along the shore", applied, as they were, to navigable waters where the tide does not ebb and flow, were used to designate the line where land and water meet and in no other sense. It follows, therefore, that Massachusetts did in conveying to Phelps and Gorham convey to the water's edge and the successors in interest to Phelps and Gorham were riparian owners.

(19) To the whole of the third conclusion beginning upon page (72) and ending upon page (75).

(20) To the first paragraph of the third conclusion on page (72) reading as follows:

The practical construction by the Commonwealth of Massachusetts and the State of New York, of the Treaty of Hartford and of the grants by Massachusetts to individuals immediately following, made by uniform and unquestioned acts from the outset, and continued for a period of a century and a quarter, supports the contention that [fol. 172] Massachusetts did not reserve or retain the title to the bed of Lake Ontario, or to a strip of land between some high stage of Lake Ontario and some low stage of the lake.

(21) To the second paragraph of the third conclusion upon page (72) reading as follows:

Shortly after the conveyance to Phelps and Gorham in 1788, Massachusetts declared in unequivocal terms, in acts of her legislative body relating to the disposition of the western territory and in subsequent contracts and conveyances for the grants of lands received from New York, that she had intended to and had conveyed away all she had ever received from New York.

(22) To the first paragraph of the third conclusion upon page (74) reading as follows:

There does not appear to have been any official act or any expression of the General Court or the Legislature of Massachusetts, or of any official of the Commonwealth from the earliest times until the commencement of the present action, which suggests that Massachusetts had reserved or retained, or intended to reserve or retain any land under Lake Ontario, or along the edge of the Lake. So also the public authorities of New York, so far as the record shows have continuously treated the property as other property in the state, and as not encumbered with a right or claim of the Commonwealth of Massachusetts.

[fol. 173] (23) To the final paragraph of the third conclusion upon page (75) reading as follows:

It is true that the Treaty of Hartford provided "That no adverse possession of the said lands for any length of time shall be adjudged

a disseizin of the Commonwealth of Massachusetts"; but this, of course, does not effect the interpretation by Massachusetts (or the long continued acquiescence in an interpretation) of her own deeds and acts as conveyances of all the so-called "western territory" received from New York, leaving nothing remaining in Massachusetts.

(24) To that paragraph of the fourth conclusion upon page (77) reading as follows:

Whatever may be the rule as to accretions to the shore, applying to land adjoining the sea or arms of the sea and other tidal waters where there is a well-defined, ascertainable strip of land marked each day by the high tide and the low tide, this rule is not to be applied to bodies of fresh water where there is no high tide or low tide, and no difference ascertainable at any given time between so-called high water and so-called low water, and where the high water and low water can be found only by an investigation extending through years or generations. In the case of the sea and arms of the sea, the word "shore" has a meaning well understood; if applied to non-navigable rivers and the Great Lakes, this is not true. Accordingly, it seems the better rule, that a conveyance of land which goes "to [fol. 174] the shore" or "along the shore" of a navigable fresh water lake (without any expression of contrary intent) conveys to the water and makes the grantee a riparian owner. It is believed that such rule is in consonance with the decisions in New York (Child v. Starr, 4 Hill 369; Halsey v. McCormick, 13 N. Y. 296; Stewart v. Turney, 237 N. Y. 117).

(25) To the final paragraph of the fourth conclusion upon page (77) reading as follows:

It follows from these considerations that whether the land here in question was formed by artificial fill or natural accretion, it would not belong to the plaintiff. If formed by artificial fill on the bed of the lake, it would not belong to Massachusetts because the title to the bed of the lake was not in Massachusetts; if formed by natural accretion, it would not belong to Massachusetts because that State had not, when the accretions began, any title to the shore lands abutting on the water.

(26) To the final and concluding paragraph of the advisory report reading as follows:

The conclusion, therefore, is that the plaintiff has no title to the parcel of land claimed and described in the bill of complaint.

[fol. 175] (27) To the last sentence upon page (40) reading as follows:

In the description, in the indenture, of the various ranges in which the tract had been divided the expression "to Lake Ontario" and the expression "to the shore of Lake Ontario" were used interchangeable and synonymously.

(28) To the first paragraph upon page (47) of the report reading as follows:

The West line of Lot No. 21 in the Finley survey apparently started at substantially the same point as the west line of Lot 21 in the Shepard survey. The length of that line was very nearly the same in both the Shepard survey and the Finley survey, the slight difference being easily accounted for by the probable change in the water line during the seven years intervening between the Shepard and Finley surveys, or the accidental difference in the height of the water at the time the surveys were made. The Shepard survey described the west line of Lot No. 21, as running "to the beach of the lake and set a B Ash post"; the Finley survey described the line as running to the beach or sand bank and then beyond a substantial distance to a post marked with wavy lines, indicating water.

(29) To the following paragraphs upon page (47) and page (48) of the report reading as follows:

[fol. 176] (b) In a deed from the Earl of Craven (successor in interest to Sir William Fultney) to Martin McIntyre made in 1868, Lot 21 is described as "in the village of Charlotte adjoining the Genesee River and Lake Ontario." In 1872, McIntyre conveyed to Byrne who in turn conveyed to Patrick Manrow, by the same description. In a deed from Patrick Manrow to the New York Central and Hudson River R. R. in 1881 Lot 21 is described as "village lot No. 21 bounded as follows: On the east by the Genesee River, on the north by Lake Ontario."

(c) In a deed from the Earl of Craven and others to Whitney and Wilder in 1863 the conveyance is of lots 20, 23, 25 and 26 "together with all the right, title and interest of the first parties in and to all the lands lying north of Lot 20 to Lake Ontario, and all the land east of Lots 23, 25, and 26 to the middle of the Genesee River."

So far as appears by the description in the deeds in evidence, the successors in interest to Phelps and Gorham treated the property as though the ownership of Lots 20 and 21 carried with it title to the edge of the lake.

(30) To the sentence upon page (50) of the report reading as follows:

[fol. 177] So far as the Record shows the State of New York has always assumed that it owned the land under Lake Ontario, in front of the premises in question.

(31) To the paragraph on page (51) of the report reading as follows:

Government records show monthly mean water levels of Lake Ontario, (above mean sea level at New York) for the period 1837 to 1859 inclusive, and from 1860 to 1922 inclusive, and there are also records based upon certain infrequent observations from 1815 to 1827. During this entire period the highest state

of the water was 249 feet above sea level, and the lowest stage 243.5. During the period 1815 to 1827 the water did not, at any time, reach above 247. From 1860 to 1922 there were periods of many years when the water did not exceed 247. The mean elevation of the lake waters during this period was estimated at a fraction over 246 feet—246.19. These records, taken with such indications as the land marks gave of the probable height of water in the region, afford no satisfactory basis for determining any fixed or settled mark that might be accurately called "ordinary high water" or "ordinary low water." Various theories were submitted as to what should be considered "ordinary high water" and "ordinary low water." One estimate made by taking averages of heights above the estimated mean, was 246.98 feet.

(32) To the two paragraphs upon page (55) of the report reading as follows:

[fol. 178] Test pits dug in the property in dispute indicated natural material (as distinguished from artificial fill) extending somewhat above the present lake level and above the estimated "mean level" (for a period of 85 years).

The exact character (that is whether natural or artificial) of the material found in the test pits, above that admittedly of natural formation, and the extent to which such contested material was above or below some estimated "ordinary high water mark" (also the subject of conflicting opinion) cannot be determined with any degree of accuracy, and the testimony on this subject does not affect or contradict the evidence that the premises in dispute existed as land, and were used as such, prior to the date of any artificial fill, or any occasion for such fill.

Commonwealth of Massachusetts, by Jay R. Benton, Attorney General; Edwin H. Abbot, Jr., of counsel.

[fols. 179-220] In Supreme Court of the United States

[Title omitted]

Testimony Taken Before Hon. Wade H. Ellis, Special Master.

Rochester, New York,
September 24th, 1923—10 a. m.

Appearances

Hon. Jay R. Benton, Attorney General, by Edwin H. Abbot, Jr. Esq. and Percival D. Oviatt, Esq. for the Commonwealth of Massachusetts.

The Attorney General, by Anson Getman, Esq., Deputy Attorney General, for the State of New York.

Charles L. Pierce, Esq., Corporation Counsel, by Albert L. Shepard, Esq., Deputy Corporation Counsel, for the City of Rochester.
George Y. Webster, Esq., for the County Clerk of the County of Monroe.
Eugene Van Voorhis, Esq., for Commissioners of Appraisal.
Daniel M. Beach, Esq., for the New York Central Railroad Company and The Central Union Trust Company.
Hon. Arthur E. Sutherland, for the Ontario Beach Hotel and Amusement Company and the Upton Company.
H. Otis Poole, Esq., for Emil Boshart and wife and Milton J. McIntyre and Belle McIntyre, his wife.
Clarence P. Moser, Esq., for the Bartholomay Company, Inc.

[fol. 221] OFFERS IN EVIDENCE

Mr. Abbot: Your Honor, I first offer a certified copy of the Treaty of Hartford, concluded the 16th day of September, 1786, which comes from the public records of Massachusetts.

The paper referred to was received in evidence and marked Plaintiff's Exhibit 1.
The exhibit was read in full by Mr. Abbott.

Mr. Abbot: If counsel are agreeable, I should like to stipulate that the Acts of New York and Massachusetts, relative to the confirmation of this treaty shall be deemed to be in evidence and available to both parties.
Judge Sutherland: The Federal Court takes judicial notice, anyway, of the statutes of the state.
Mr. Abbott: I can give you both the New York and Massa-
[fol. 222] chusetts.
The Master: Let the record show the reference to the statutes and confirmation.

References to be supplied later.

Mr. Abbot: I have here a certified photo-static copy of pages 107, 108, 109, and a portion of 110, of Volume 1 of the Treaties, Contracts, etc., deposited in the Archives Division of the Secretary of State's Office of the Commonwealth of Massachusetts, being an Indian deed to Phelps and Gorham; and if I may, I will read from a typewritten copy.

The paper above referred to read in full by Mr. Abbott.

Mr. Abbot: I will offer that in evidence.

The paper last referred to was received in evidence and marked Plaintiff's Exhibit 2.

Judge Sutherland: A copy of that Treaty of Buffalo Creek, is found in the American State Papers, Volume 5, of the papers relat-

ing to Indian affairs. Those State Papers were printed by authority of Congress, and are in all of the public libraries.

Mr. Abbott: I now offer a certified copy of the confirmation and statute conveying lands to Phelps and Gorham, the Massachusetts Statute.

The paper last referred to was offered and received in evidence and marked Plaintiff's Exhibit 3.

[fol. 223] The paper received in evidence was then read in full by Mr. Abbot.

Judge Sutherland: If it may appear on the record, your Honor, that this Exhibit 3 contains two resolves of the State of Massachusetts, the first in March, authorizing Phelps and Gorham to deal with the Indians for the whole of Western New York. Then comes in proper chronological order the Treaty of Buffalo Creek, which has been read as Exhibit 2. Then comes the confirmatory resolve of the State of Massachusetts, confirming the purchase from the Indians, which was perfected at Buffalo Creek in July; but Exhibit 3 contains two resolves, the first, the preliminary resolve, which had reference to all of the Western lands running to a mile east of the Niagara River; and the second in November, confirming the second grant which the Indians made.

Mr. Abbot: I would like to have it considered that I offer them both in evidence, and put them in by this Exhibit 3.

Mr. Abbot: I am now about to prove the line to the shore, and then along the shore, as established by the surveys at this point and put on the ground as it is today.

[fol. 224] Arthur Vedder, called as a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

Direct examination.

By Mr. Abbot:

Q. What is your name?

A. Arthur L. Vedder.

Q. What is your position?

A. Civil Engineer and Surveyor with the title of Superintendent of Surveys and Deputy Superintendent of Civic Plan.

Q. Of the City of Rochester?

A. Of the City of Rochester.

Q. I didn't quite catch the title?

A. Superintendent of Surveys.

Q. Did you as Superintendent of Surveys of the City of Rochester cause this plan of which I show you a blue print to be prepared.

A. Yes, sir.

Q. At what time did you cause it to be prepared?

A. I don't know that I can tell the exact date unless it is on here; I think sometime in 1920 this was prepared.

Q. Did you upon that plan cause to be correctly surveyed and platted a tract belonging to the New York Central Railroad and under lease to the Ontario Beach Amusement Company at that time?

A. Yes, sir.

Q. How is that tract described here upon the plan?

A. It is bounded on the north by Lake Ontario; on the south by Beach Avenue; on the east by the Genesee River and on the west by lake avenue.

[fol. 225] Q. And did you cause another tract to be surveyed and platted belonging to the Bartholomay Brewing Company so called?

A. I did.

Q. Will you give the general description of that?

A. The Bartholomay Brewing Company's property lay, the major portion of it, north of Beach Avenue and west of Lake Avenue, and was bounded on the west by a line that was parallel with the lot line. That does not show the definite distance away of property line. There were, however, coming out of that property three other holdings, one owned by McIntyre, one owned by Beehart, and one by the Rome, Watertown and Ogdensburg, that are shown in their respective distances from Lake Avenue and the west property line, as shown on the map. There was also a holding of the Bartholomay property that lay south of Beach Avenue and adjoins the corner of Lake Avenue and Beach Avenue as shown on this map.

Q. To the west of this Bartholomay piece, so called, is there a tract which is commonly known as Terry Park to your knowledge?

A. There is a holding in general on this map that lies between the Bartholomay line and the west line extended twenty feet northerly and then comes the Terry Park Tract.

Q. Did these two tracts purporting to be owned, one by the New York Central which you described east of Lake Avenue and the other tract of the so-called Bartholomay Brewing Company, includ-[fol. 226] ing the three little holdings to which you have referred—were those included in a purported taking by the City of Rochester for park purposes?

A. They were.

Q. And those tracts which I have just referred to, were they surveyed and platted by you in connection with that taking and describing the same?

A. They were.

Mr. Abbot: I offer this blueprint in evidence.

Mr. Sutherland: While not objecting to this we do not wish to be considered as admitting that all of the legends and all of the markings upon this map are correctly made, but we do not want to interrupt the flow of the proceeding. There is a line of a street called River Street on this map which has no visible existence at the present time.

Mr. Abbot: We are going to prove that.

(Blueprint received in evidence and marked Plaintiff's Exhibit 4.)

Q. Did you upon this blueprint, this map Exhibit 4, plot, survey or cause to be surveyed and plotted two boundary lines known as the so-called Shepard line and the so-called Finley line?

A. I did.

Q. From what source did you take the so-called Shepard line?

A. From notes that are a part of the County Clerk's record.

The Master: What do you mean by notes, field notes?

The Witness: They are a copy of field notes, purport to be, of field notes by Shepard and Finley, made by an agent of the County Clerk taken from the land office at Bath, New York.

[fol. 227] Q. Are those on file in the office of the County Clerk as a public document?

A. They are.

Q. Is this copy to which you refer on file in the office of the County Clerk of this county as a public document?

A. It is.

Mr. Abbot: I propose subsequently to produce that public document but for convenience at the present time in connection with this examination I will use a copy, if there is no objection.

Mr. Sutherland: No objection.

Mr. Beach: No objection.

Q. At what time does this survey of Shepard purport to have been made according to this public document which you say is on record in the County Clerk's office?

A. I think 1803.

Q. Who was this Shepard, so far as you learned from the record?

A. A surveyor who divided that portion of what is now the Town of Greece, township 2, short range west of the Genesee River into lots. These lots consisted of three sizes which he called the first, second and third divisions. The third division was the village allotment on the west side of the river at the mouth of the Genesee of which lots 20 and 21 were a part.

Q. This village allotment is in the so-called Town of Greece which has since been annexed to the City of Rochester?

A. I believe that for explanation he named the village Charlotte after a wife or daughter of Col. Williamson who was the land owner or agent at Bath.

[fol. 228] Q. The name of the village then was Charlotte?

A. Yes.

Q. And this village is located in the Town of Greece?

A. Yes.

Q. And the village has since been annexed to the City of Rochester, the village of Charlotte?

A. It has, in 1916.

Q. Have you before you the notes from which you caused to be made and plotted the so-called Shepard line upon this Exhibit 4?

A. I have.

Q. What steps did you take to lay out that line upon the ground?

A. We laid out the north line of lots 20 and 21 from the south lines of 20 and 21, giving the allotted distance as shown by Shepard

in his notes, measured along Lake Avenue in both 20 and 21. These are found in the case of lot 20 on page 80 at line 12 and give the west line of lot 21, continued the line 5.26 to the beach of the lake and set a B. Ash post. The east line of lot 20 is described on page 78 of the notes, line 8, as "continued the line being the easterly line of lot No. 20, 5.25 to the beach of the lake "where I set an elm post."

Q. Both these references which you have read are quotations from a public document now on file in the County Clerk's office?

A. They are.

Q. And refer to the page and line in that public document?

A. They do.

Q. I understand you to say that you surveyed the north line of lot 20 by taking certain distances named in the notes from the south line; am I correct in that?

A. That is correct.

Q. And in the same way you determined the north line of lot 21 [fol. 229] by taking certain distances from the south line of lot 21; is that correct?

A. That is correct.

Q. In what way did you determine the location of the south line of lot 21?

A. In the original notes Shepard states that he laid out a cross street half way back or about half way between the north and south lines of the village, Latta Street, and we laid out the south line of lots 20 and 21, respectively, from Latta Street, the lots being then 4 chains in width from Latta Street, except that we allowed some surplusages that were allowed by another surveyor who made an official survey for the village of Charlotte in 1886. The amount of surplusage between Latta Street and the south line of these lots was 4.17 feet, as I recall it offhand from his map which shows what the surplusage is. Had we not allowed that surplusage it would have placed the south line of lots 20 and 21 4.17 feet farther south than we placed them and would have therefore placed the north line of the lots that much farther south. The allowances made by this other surveyor who made the survey for the village correspond very closely with occupation on the ground.

Q. Who was this other surveyor?

A. John C. Ryan.

Q. Is he now living?

A. No, sir.

Q. Has his survey been used since that time as determining the various lot lines along this street for occupation and conveyance purposes?

A. I think so.

Q. And in allowing these variations of 4.17 feet you gave the [fol. 230] benefit of that variation to the lot owners and to that extent moved the Shepard line forward toward the lake, to that extent; am I correct in that?

A. It would move the Shepard line as recorded in his notes farther north to the lake, the north line of 21. However, Shepard used

a chain and probably measured wrong and we thought that it more nearly corresponded with Shepard's line than using the notes exactly.

Q. In other words you gave the benefit of the variation to the lot owners?

A. Yes.

Mr. Beach: We do not object to the south line of lot 20 or lot 21 as established by Mr. Vedder.

By the Master:

Q. If you had allowed both the surplusage and the variation because of the fact that Shepard used what you call a long chain the Shepard line might have gone even farther north?

A. No, it would have gone farther south if we had just used his notes.

Q. But if you had taken into account what you call a long chain and also taken into account the surplusage in your survey his line would have gone a little farther north than you finally fixed it, would it not?

A. It might have gone a few inches north.

By Mr. Abbot:

Q. Would the variations have gone as much as a foot by reason of the suggestions which the master has made?

A. I don't think so. As proof of that, in the nine lots there are [fol. 231] 36 chains between Latta Road and the south line of 21. There is 4.17 feet surplusage. It is 5.26 chains or 5.25 chains as you may take the respective lines 21 and 20 from the south line to the north line, so that if it is 4 feet in 36 chains, in 5 chains there would not be more than a foot variation.

Q. Now, beginning at the south line of lot 21 on Main Street, which I understand is accepted as correct by counsel for the respondents as shown upon Exhibit 4, will you give the boundaries as established by Shepard of that lot 21?

Mr. Sutherland: It occurs to me the word "boundaries" may be capable of two interpretations hereafter. I would like to ask counsel what he is calling for, the lineal dimensions given by Shepard in his notes or his general observations as to where this lot goes to.

Mr. Abbot: I will say to avoid that difficulty the lines laid out by Shepard.

Mr. Sutherland: The lineal dimensions?

Mr. Abbot: With respect to 21 the north and east lines.

A. 86 will be the north and east lines. I will start there.

Q. Will you begin with the west line of lot 21 as beginning on Main Street at the south line?

A. Page 80, line 12. "Continued the line 5.26 to the beach of the lake and set a B. Ash Post."

Q. And that continued line means the line of Main Street or Lake Avenue as it is now called?

A. Yes, sir.

Q. And that point 5.26 on the beach of the lake where the B. Ash [fol. 232] post was set is the northwest corner of the lot?

A. Yes, sir.

Q. Now from that point where did the next line——

Mr. Sutherland: Wait a minute. That last question we object to. We are not objecting to Shepard's notes or Finley's notes at all but we do not wish by inadvertence to be understood as accepting some interpretation of these notes either by counsel or the witness. We are going to have the documents themselves this afternoon and I do wish we would not have anything bordering on interpretation from the witness or counsel We are allowing this witness to tell what is in Shepard's and Finley's notes that are now in the Court House without objection but we do not wish the witness to be permitted to interpret those notes or counsel to say what they indicate. The last question I object to. I think it calls for interpretation.

Mr. Beach: In other words, the notes do not contain the words, "lot" and "corner".

The Witness: No, sir.

Mr. Sutherland: May we have that stricken out?

The Master: I do not think it does any harm to let it go in.

Q. Now from that point where did the next line go?

A. I will read the description of the north and east line contained on page 86, lines 8 and 9. "First Cs.—S. 42 degrees East, 8.00." [fol. 233] "2nd ditto—— S. 8 degrees East—7.00 to the traverse of the Genesee River and set a stake being at the northeast corner of the Township."

Q. The abbreviation Cs. stands for what?

A. Course, I think.

Q. Doesn't it indicate the distance, chains?

A. No. Course south 42 degrees east was a direction, the bearing of his compass to 8.00, meaning 8 chains.

Q. And the 7.00 represented seven chains?

A. 7 chains.

Q. And the 5.26 in the description of the west line meant 5.26 chains; is that correct?

A. Yes, sir.

Q. Now the south line?

A. The line between lots 21 and 22 in town plot is 9.50 from the Lake traverse to the east line of Main Street.

Q. When you came to lay that out on the ground from the township corner to Main Street or Lake Avenue as it is now called, that distance, did you find that that corresponded?

A. We laid out the distance as given on these notes on the ground from the northwest corner of lot 21 as shown on the Shepard notes, laid out this traverse and set stakes which were shown to the Court etc. yesterday.

Q. Now, taking lot No. 20, of which I understand the south line is accepted as a correct starting point, will you lay that out for us according to the Shepard notes?

A. The east line we have here laid out, page 78, line 8, "Continued the line being the easterly line of Lot No. 20 5.25 to the beach of [fol. 234] the Lake where I set an elm post." The south line, page 87, line 16, "The lengths of the lots west of Main Street is 10.00." North line, page 85, line 20, "Traverse of Lot No. 20, 3rd division." "1st Cs. S. 44½ East—10.94 to the west line of Main Street and northeast corner of Lot No. 20." West line, page 79, line 13, "Continued the line 8.53 to the beach of the Lake where I set a Chestnut Post." Those are the boundaries of Lot 20.

Q. Did you correctly lay out these lines and courses which you have read upon the ground with reference to the south line of lot 20 and the south line of lot 21?

A. I did.

Q. Is there upon your plan a street known or called Beach Avenue? That street was in existence when you laid out these lines?

A. It was.

Q. And those lines are correctly plotted with relation to Beach Avenue as shown upon your plan Exhibit 4?

A. They are.

Q. Now taking the so-called Finley line, did you cause that to be laid out upon the map also?

A. I did.

Q. Have you the notes which you used in connection with laying that out here before you?

A. I thought I had but I do not seem to have them. I will send over for them and have them herein inside of five minutes. I did not seem to get copies of some typewritten notes that I made yesterday.

[fol. 235] Q. Will you read the courses and distances that you used in laying out the Finley line?

A. Page 106——

Mr. Beach: Pardon me, Mr. Abbot, this is in the same book of records, is it?

Mr. Abbot: Yes. I beg your pardon. I overlooked this.

Q. Where are those so-called Finley notes found?

A. In the same book of records that are in the county clerk's office, in the back of the same book that contains the Shepard notes.

Q. And your page numbers refer to pages in that record as found in the county clerk's office; is that correct?

A. They do.

Q. At what time does this survey by Finley purport to have been made, if you know?

A. I think 1810 or '11. My memory isn't certain on that.

Mr. Beach: 1810.

Witness: The notes state on them the date.

Mr. Abbot: Is it subject to correction.

The Master: The notes state 1810?

Witness: All right. I haven't consulted those notes for a year, I think, and my memory is somewhat rusty on the dates.

Q. Who did this man Finley purport to be, so far as you know?

A. In his survey he says that he made a survey of sundry lots of the third division of Township 2, Short Range West of the Genesee River, and the notes were copied from the Bath Land Office. I have [fol. 236] always supposed that he was a surveyor sent out to establish certain lot lines by the Bath Land Office, and left his notes of what he did.

Q. And this Township and Range to which you have referred is the Township and Range which goes along Main street or Lake avenue, as it is now, in the village of Charlotte?

A. The third division, as I stated before, was the division—He divided all of the Township Two, Short Range West of the Genesee River, into three divisions, and the third division was the village, the village of Charlotte.

Q. This is Shepard?

A. Shepard, yes.

Q. And the Finley survey is in that third division of Shepard, in the village of Charlotte?

A. I think he made a survey of one other lot in the second division as well.

Q. But the notes to which you now refer, and which you will read, refer to this same Lot 21, of which you have just given the lines according to Shepard's survey?

A. They do.

Q. Will you put those in?

A. "Beginning at a post standing in the south S. E. corner of lot marked Number 21, above a line Number 22 H; thence on the south line over low marshy ground to a ridge of dry land," and over to the left gives a course of 61 degrees, 45 minutes west, and in a ruled column, under "Chains," "5," and under "Link," "20."

Mr. Abbot: It is suggested by counsel that when the stenographer [fol. 237] comes to type this testimony he type it just as it is shown in the original, so that we shall have the original as nearly reproduced as possible.

Mr. Beach: Yes.

The Master: That's all right.

Q Did you lay out upon the ground these various courses and distances as given by the Finley notes?

A. One of my men did, under my direction, yes.

Q. And did you mark those lines by wooden pegs?

A. Stakes, yes.

Q. And was that true also of the Shepard lines to which you have previously referred?

A. Yes. I so stated.

Q. And yesterday, when a view was taken by the Master, those lines and stakes were pointed out upon the actual ground, were they not?

A. They were.

Q. By you and your assistants?

A. They were.

Mr. Abbot: When the original record in the county clerk's office is produced this afternoon which we are now putting in and treating as evidence, I will ask to have copied from the original book, pages 106, 108, 109, which contain all the data with respect to Lot 21 as surveyed by Finley.

Mr. Sutherland: Doesn't page 107 have some date with relation to those two lots?

Mr. Abbot: Well, the pages which refer to this Lot 21 of the Finley notes

Q. Now, Mr. Vedder, can you tell me what this Bath Land Office is, to which you referred?

[fol. 238] A. It was an office, as I have understood, that in the early history, under the management of the English syndicate which took over the Phelps and Gorham purchase. I believe the first land office agent's name was Williamson, and this land office existed up to about ten years ago.

Q. Was this English syndicate known, or commonly known in this region as the Pultney Estate?

A. Yes.

Q And you understood that the Pultney Estate, so called, embraced a portion of the Phelps and Gorham purchase which the Pultney Estate obtained under or through Phelps and Gorham; is that correct?

A. I think that's correct.

Q. For whom did Shepard make his survey, if you know?

A. Why, his notes were in the Bath Land Office. I suppose he made it for the owners or their agents.

Q. For whom did Finley make the survey, if you know?

A. I suppose the same thing.

Q. For whom did you make this survey and lay out these lines of Lot 20 and Lot 21, reproducing these old surveys?

A. Why, it was done as part of my duties as Superintendent of Surveys, the map to be used for taking over this property in accordance with the ordinance, and was done with consultation with our Corporation Counsel and office.

Q. That is it was done as part of your duties on behalf of the City of Rochester?

A. Yes.

Q. Or in behalf of the City of Rochester?

A. Yes.

Q. Mr. Vedder, in connection with the Shepard notes, did his [fol. 239] notes show the width of Main street or Lake avenue, as it is now called?

A. They did.

Q. What was that?

A. Page 77, line 9: "Main st. laid out 1.50 wide." Page 86, line 2: "Thence S. 62 degrees E. 1.50 to the East line of Main street on the Lake Shore.

Q. Does this last line which you have read refer to a course and distance by which Shepard passed from the west side of Main street

or Lake avenue to the East side of Main street, in connection with laying out the northerly lines of Lots 20 and 21?

A. It does

Q. Let me ask you, Mr. Vedder, with regard to this so-called River street. Did you find in the Greece records book, Book 2, pages 16 and 17, a reference to that street?

A. I did.

Q. Did you in the Finley notes find a reference to the two sides of that street?

A. We did.

Q. Was there a portion of Lot 21 bounded easterly on that street, then the street intervening, and two subdivisions of that lot on the westerly side of that street?

A. There were.

Mr. Moser: Easterly.

Witness. On the easterly line of the street.

Q. Yes, on the easterly line of the street.

A. East of the street.

Q. East of the street?

A. There was.

Q. Do you find in the Finley notes the point to which that street came at that time? Is that defined by the Lot 21 and the two subdivisions thereof with respect to the then lake shore?

[fol. 240] A. Why, it ran to the——

Q. Refresh your memory from the notes, if you care to.

A. It called this street Water street, according to the notes.

Q. And, refreshing your memory from the notes, did the northerly point of the first subdivision of Lot 21 bound upon the lake shore at that time?

A. It says, "Along the shore of the lake to a post."

Q. Has that street any physical existence upon the ground to-day at that point?

A. I don't think so.

Q. Has it any physical existence north of the northerly side of Beach avenue, upon the ground?

A. Not as a street, I don't think so. There has always been a path on what they called the "Midway" there, very close to it. I don't think it had any relation but it was there. It wasn't used as a street. There was an opening there to the fence. I don't know whether it was done with premeditation or forethought by the company or not.

Q. As a physical matter upon the ground, whether or not River street or Water street doesn't end in a dead end considerably south of Lot 21.

A. I don't think there has been a street open for vehic*al* traffic through there. I have a memory from yachting and so forth, of traversing up and down, that there was always a way of getting back and forth there, a passageway. It might just simply have been a passageway. I think as a physical street it did not exist. That's only my private opinion.

Q. Then, in mapping out River street beyond the Finley line you [fol. 241] *you* simply indicated a paper street with no physical existence?

A. I think that's the case.

Q. Subject to the qualification which you have just made with respect to River or Water street, is Exhibit 4 correct?

A. I think it is. I think in regard to Water street, as I understood the matter when we mapped it out, it was simply a matter of legal technicalities and not an existence on the ground.

Mr. Beach: Well, do you claim there is or isn't a street there? We can stipulate that any time you want to. There never was a physical street there.

Mr. Abbot: I claim there never was any street beyond the Finley line.

Mr. Beach: All right, we will agree with you.

Mr. Abbot: It is agreed by counsel, then, that River or Water street (it is called Water street in the Finley notes and River street now) had no physical existence beyond the point indicated by the Finley notes.

Mr. Beach: Yes.

Mr. Abbot: And that beyond that point it is simply an indication of some one's conclusion with respect to a paper street.

Mr. Beach: And that the indication of River street or Water street on the map has no significance in this case.

Mr. Abbot: Exactly. Your witness.

Cross-examination (to Mr. Beach):

Q. Mr. Vedder, on this Exhibit 4 you have indicated lines on Lot [fol. 242] 20 labeled, "Approximate shore line of Lake Ontario in 1888," and the same in 1873.

A. Yes, sir.

Q. You didn't continue those across Lot 21?

A. No. They were taken from deeds of the Bartholomay property, and were put on from deeds.

Q. Yes.

A. And meant just what they said, "Approximated shore lines," and were taken, as I say, from records that we got out of some of the searches.

Q. You didn't make any survey at that time yourself?

A. No, sir.

Q. And you don't mean to indicate by the failure to show such a shore line on 21 that there was such shore line approximately in the extension of those others?

A. I haven't the slightest idea where they were there.

Q. I see. Now, Mr. Vedder, in the Finley notes, which are, as I understand, in evidence in full relating to these particular lots, I refer you to the portion thereof marked, "West line." Have you it before you?

A. I have. Which page are you referring to?

Q. Well, it's the west line of Lot 21? It starts out, "Over upland timber."

A. Yes.

Q. Now, I should like to have for the benefit of the master that particular wording at this time. Will you read that west line of Lot 21, running from the northerly line of Lot 22, northward?

A. "West line——"

Q. Just read it in sequence, and without reference to the brackets.

A. "Over upland timber, timbered with white oak and hickory, [fol. 243] to a marsh. Across the marsh to beach or sand bar."

Q. Well, you didn't read the distances.

A. No, I didn't. I thought you meant to omit them. Over to the left it gives a course, "North 28, 15 East, 3 chains, 20 links." "4 chains, 40 links, across the marsh to the beach or sand bank."

Mr. Sutherland: "On said land," isn't it?

Q. Beach or sand bank?

A. Sand bank.

Q. That's all you have?

A. That's all I have.

Q. All right. We can correct this by the original records later if it is erroneous. Go ahead.

A. "Thence 5 chains and 8 links to a post marked HNO 21, standing on the shore of Lake Ontario."

Q. Thence on the north?

A. "Thence on the north line——"

Q. (Interrupting.) Now, let me ask you. The distance indicated there of 4 chains, 40 links, appears to lead that line to the beach or sand bank, doesn't it?

A. (Witness did not answer.)

Q. In other words, the beach or sand bank is 4 chains and 40 links from the north line of Lot 22?

A. Yes.

Q. Now, the next distance is across that beach or sand bank to the shore, a distance of 66 links; is that not true?

A. Yes.

Q. So that that would indicate that that 66 links passed northerly over the shore or beach to the water's edge, would it not?

A. I should think so.

Q. In other words, where they indicate that that survey is made to the shore of Lake Ontario those notes indicate that he went to the water's edge?

A. I should think so. It does not say neces- to the water's edge. [fol. 244] It says, "Standing on the shore."

Mr. Beach: This Lot line 21, measured from the corner which your Honor saw, goes northerly a distance of 4 chains, 40 links, across the marsh to the beach or sand bank. It then proceeds, and you will correct me if I am not stating as you stated, in the same course, due northerly, 66 links to the shore. As Mr. Vedder has stated, that indicates that that course ran over the sand bank or

beach to the shore, and to his mind he has stated that that indicates that that line went to the water's edge.

Q. In other words, it would indicate that the beach or sand bank, as described there, was 88 links in width; is that not so?

A. The formation, I think, of the lake shore there is shown distinctly on his map that accompanied the survey.

Q. No, Mr. Vedder. You stated that that 66 links ran across and over in a northerly direction, the sand bank.

A. To the shore of the lake.

Q. Yes. The distance went 4 chains and 40 links to the beach or sand bank; that's the way it reads, isn't it?

A. Yes. It went 3 chains and 20 links over some oak and upland timbered with oak and hickory to a marsh.

Q. Yes, exactly.

A. Then he gives his next station as 4.40, which would be a chain and 10 links farther along.

Q. A chain and 20 links, wouldn't it be?

A. Chain and 20 links farther along across the marsh.

Q. Yes.

A. That is, the marsh was a chain and 20 links wide.

[fol. 245] Q. Yes.

A. And to a sand bank.

Q. Yes, to the beach or sand bank. Just read it.

A. To the beach or sand bank.

Q. Yes.

A. And then he goes on——

Q. 66 links, isn't it?

A. 68 links.

Q. 68?

A. To the shore of Lake Ontario.

Q. Yes. In other words, that last 66 links or 68 links, according to the notes, would be across that beach or sand bank to the shore?

A. Yes, across the bar.

Q. To the shore?

A. To the shore.

Q. That indicates to you, as you have stated, that that went to the water's edge.

A. I wouldn't say necessarily it meant to the water's edge. It meant to the shore.

Q. He has defined a beach or sand bank as one section of that territory which he surveyed?

A. Yes.

Q. He went to the edge of that, didn't he?

A. Yes.

Q. Then he went across that 68 links to the shore?

A. To the shore.

Q. So that he included that beach or sand bank in this territory which he was surveying?

A. Oh, certainly.

Q. In Lot 21?

A. In Lot 21.

Q. Now, you state that that point, Finley's point, on the map which is in evidence, Exhibit 4, is about how many feet south of the Shepard point?

A. Eleven feet, something.

The Master: At that point?

Witness: At that point.

[fol. 246] Q. At that point?

A. Yes.

Q. So that if Shepard were correct at the time that he made his survey the shore of the lake was still farther north when Finley made his survey at that point?

A. Yes.

Q. On Main street?

A. Yes.

Q. Then the Finley line crosses the Shepard line and goes north of it on Beach avenue?

A. That's correct.

Q. A distance being about how far north of the Shepard line at the farthest point?

A. That's rather an incomprehensible question.

Q. I will put it another way. How far north of the Shepard line, as shown upon your map, is the Finley line at the point where the Finley line apparently crosses the south line of Beach avenue?

A. The Finley line is about 40 feet north of the Shepard line at that point.

Q. At that point. That would indicate that the shore had made out 40 feet in about seven years, would it not?

A. It would mean that the shore was different at the time. It might or might not have meant that the shore was different at the time that the two respective men made their surveys.

Q. It shows the shore line that distance that you have stated when Finley made it, to be 40 feet farther to the north than when Shepard made it.

A. It shows that Finley, who ran more courses than Shepard did, got farther out, farther north than Shepard did.

Q. In other words, you don't mean to infer that Finley did not [fol. 247] run a correct course?

A. No. He made more courses and probably from the way his notes plot up on the map, he probably more nearly approximated the shore line than Shepard did, who did it in two courses.

Q. In other words, Shepard didn't apparently run along the shore line, but took a traverse or straight line between two points?

A His notes say, "Along the shore of the lake."

Q. Exactly. And Finley's notes say, "Along the shore of the lake."

A. I wasn't there.

Q. Well, that's what it says, isn't it?

A. Yes.

Q. Then, if the shore shown by Finley was correct in 1810, and

Shepard was correct in 1803, it shows that the shore line made out to the north about 40 feet, or whatever you stated, in those years?

A. (Witness did not answer.)

Q. Isn't that true? Now, just answer it.

A. To tell you the truth——

Q. Now, wait a minute. Can't you answer that question?

A. No, because I wasn't there. I don't know what either man did.

Q. I know; but you know they both indicated the shore line?

A. I know what their notes say.

Q. You know one is farther north of the other?

A. One is farther north of the other.

Q. Now, if they are both correct, it indicates that the shore line was farther out in 1810 than it was in 1803?

A. I think so, to see the notes.

[fol. 248] Q. That's all I wanted to know. It would also indicate that between the time that Shepard made his survey, if correctly made, and the time Finley made his survey, if correctly made, the shore made out to the easterly end of these survey lines a considerable distance, would it not?

A. You might draw that conclusion.

Q. Yes; but it indicates the shore much farther to the north and east than it did when Shepard made his survey; isn't that so?

A. There are so many things——

Q. Well, I am only asking you what the survey shows.

A. Yes, the survey show that.

Q. Well, that's what I'm asking you.

A. Yes. They show that one is north of the other; that's what they show.

Q. Well, it shows that the shore made out, or, that the shore was farther out in 1810 than it was in 1803, if both of those surveys were correct?

A. (Witness did not answer.)

Q. Isn't that true?

A. One line runs farther north than the other.

Q. Can't you answer the question?

A. One man is—I think I have answered the question.

Q. (Question read as follows: It shows that the shore made out, or, that the shore was farther out in 1810 than it was in 1803, if both of those surveys were correct?)

A. As they describe them in their notes, yes.

Q. Well, "Yes," is what I wanted. In connection with the Greece Field Notes which you have spoken about, there is a map made by Mr. Finley, following this survey, is there not?

[fol. 249] A. Yes, sir.

Q. That is a part of the record, the same as the notes which you have referred to heretofore?

A. It is.

Q. Did Shepard make a map following this survey, that you know about?

A. He did.

Q. Have you a copy of that?

A. There is a copy in the county clerk's office of that survey.

Q. That is in connection with a certain partition deed, dated 1804, isn't it?

A. I think so. In the county records, Ontario county records.

Q. I show you a map, and ask you if that is, so far as you can see, a correct photostatic copy of the map referred to?

A. I think it is.

Q. And that map indicates on it Lots 20 and 21, which we have been talking about?

A. Well, they are almost indistinguishable. It does indicate them.

Q. Well, you can see that it says, "20" and "21" on there, can't you?

A. Certainly.

Q. Then it is distinguishable; isn't that true?

A. Yes.

Mr. Beach: Do I understand you offered that Finley map in evidence?

Mr. Abbot: No.

Mr. Beach: That is a part of the evidence that is related to the notes which you have put in evidence.

Mr. Abbot: I have put in simply the descriptions.

[fol. 250] Mr. Beach: I offer this in evidence. This map is a photostatic copy, attached to a copy, both of which are certified by the clerk of the county of Genesee, state of New York; and, just briefly, to indicate what the deed is, it is a partition deed between Sir William Poultney, who has been referred to here, and various other owners of undivided portions of Township 2, Short Range West of the Genesee River; and on the face of it it appears that it allots to the English heirs various township lots, so-called, including lots numbers 20 and 21 under discussion in this particular case, and which have been referred to as such numbered lots, namely, 20 and 21.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 1.")

Witness: I didn't mean to equivocate there about that 20 and 21, but the third division is so small on that map that it is almost unreadable. That was the only reason for saying that the way I did.

Q. That is, for a man of your age?

A. Yes.

Q. Now, these lots 20 and 21, shown as those small lots referred to by you, are the township lots?

A. Town lots; third division, as he called it.

Q. Those lots upon that map are shown as bounded by Lake Ontario and the Genesee River?

A. As near as you can see, yes.

Q. Well, can't you see that it is? Can't you see that it is?

[fol. 251] A. Why, it is small. It shows a line there.

Q. Shows they are bounded by the lake and by the river, doesn't it?

A. Yes.

[fol. 252] Mr. Vedder recalled.

Examined by Mr. Oviatt:

Q. I direct your attention to that portion of the Finley notes to which Mr. Beach referred on your cross-examination, and particularly to the notes indicating the course of the western line of lot 21 reading as follows: 3 chains, 20 links,, over upland timbered with white oak and hickory to a marsh, 4 chains, 40 links across the marsh to a beach or sand bar, 5 chains, 8 links to a post marked H. No. 21 standing on the shore of Lake Ontario; and I ask you if in that portion which I have read, or any other portion of the Finley notes there is anything to indicate where the water-line is?

Mr. Sutherland: I object to that as calling for a pure interpretation, Your Honor.

Mr. Oviatt: This is redirect upon the cross-examination of Mr. Beach who asked whether that ran to the center of the lake.

The Master: I am inclined to let this go in under the objection.

Exception to Mr. Sutherland.

A. There is nothing in the notes that says that he ran to the Lake. It says to the shore. Mr. Beach asked that question and I answered it "Yes," and then qualified it by saying that the notes said to the shore.

Q. Is there anything in these notes to indicate as to how far north [fol. 253] of the post which is marked at the point indicated, 5 chains and 8 links, the water line?

Mr. Sutherland: I object on the ground that it assumes that there is a space between the point 5.08 and the water line.

Mr. Oviatt: Question withdrawn.

Q. Is there anything to indicate in the notes anywhere as to where with reference to the post which is marked 5.08 north of the starting point of that west line where the water-line was?

Mr. Sutherland: I suppose that is under the ruling which Your Honor made admitting the last question but one so that it is not necessary for me to repeat the objection and exception.

The Master: Yes.

A. I don't think that there is.

Q. Did you, in your direct examination or on your cross-examination, read into the record as part of the Finley notes with reference to this line that we are talking of "to a post marked H. No. 21 standing in the shore of Lake Ontario"?

A. I think I did.

Q. You have been questioned on your cross-examination with reference to the relative location of the Finley line and the Shepard line and I think you stated that as to parts of the Finley and Shepard line, the Finley line passed somewhat to the east of the Shepard line?

A. I did.

Q. How many years intervened between the two surveys of Shepard and Finley?

A. 7 or 8 years.

[fol. 254] Q. Have you had any experience or have you acquired any knowledge as to the fluctuations of Lake Ontario?

A. High or low water?

Q. Yes?

A. Yes.

Q. Do you know about how much in your experience the lake fluctuates from one year to another in level?

A. Do you mean relative elevations or do you mean area on the ground?

Q. No. Elevations of the surface of the water?

A. I have taken no readings so I do not know.

Q. Do you know that there is a fluctuation?

A. Yes.

Q. Have you any knowledge as to about what it amounts to?

A. I don't know about that, no.

Q. If not accurately, do you know generally?

A. I should think about six or seven feet.

Q. And the location of the Finley line or the Shepard line, so far as the water line is concerned would depend upon where the water was at that particular moment of time?

A. It might depend on that, yes.

Examined by Mr. Sutherland:

Q. You of course would not hazard any opinion at all as to where the Lake shore was in 1788 or 1789 when the Phelps and Gorham purchase was concluded?

A. No.

Q. You know do you not that as the years go the beach entends more and more to the north: the water is receding there all the time is it not, speaking generally, as the years go?

A. What do you mean by that question, do you mean right there at the beach at Charlotte or do you mean the general level of the [fol. 255] lake?

Q. From the pier on the river westward to where the higher land is now at the west edge?

A. There has been a steady increment there.

Q. And that covers the whole of the land covered in this proceeding, that is the shore line of this land has been progressively going to the north?

A. Yes.

Q. Now I want to call your attention to the situation in front of the pier, the Bartholomay pier, as indicated on this map attached to the answer of the State of New York, showing where the shore line was in 1887 and where the shore line was when the map made in preparation for this answer. Isn't that a correct description accord-

ing to your own knowledge of the way that shore has crept out towards the north during these years?

A. I should think so.

Q. Your memory goes back to 1888 doesn't it?

A. Yes.

Q. And do you know that from that time the shore has been growing out to the north all along from the pier out to the higher land where the cottages are?

A. Yes.

Q. Were you familiar with the conditions in what is called Terry Park, that open common that is west of the Bartholomay property?

A. I have known that property.

Q. Running from Beach Avenue down to the Lake?

A. Yes.

Q. Do you remember a few years ago when a great quantity of sand was taken out of there and carried away for some building purposes?

A. I believe it was taken out and carried away from there by the Furnaceville Iron Company.

[fol. 256] Q. And they carried a large quantity of it out didn't they?

A. Yes.

Q. And litigation was commenced by the owners in reference to that?

A. Yes.

Q. Don't you know that since that time the action of the waves and the tides and the drift of sand has fully filled up with sand the excavation that they then made in what is called Terry Park?

A. Yes.

Q. I show you now the map attached to the record book which you spoke of this morning——

Mr. Sutherland: Can we have this record book marked in evidence or considered in evidence, Your Honor? This is entitled "William Shepard's Field Notes of Township No. 2, Short Range, 1803, copied from the original notes at the Pulteney Land Office by C. B. Parsons, September 14, 1878." The latter part of the book has another inscription in it. The latter part of this book has a title page, "David Finley's Field Notes of the Subdivision of Sundry Lots in the Village of Charlotte, 1810, copied by C. B. Parsons."

(Book referred to by counsel to be considered as Defendants Exhibit 3.)

Q. That is the book that you referred to this morning in your testimony when you gave a digest of the figures in the Finley and Shepard surveys, is it not?

A. Yes.

[fol. 257] The Master: Is it understood by both sides that the testimony from the Shepard and Finley field notes constitute correct excerpts?

Mr. Oviatt: It was understood that they were to be gone over by counsel to make them correct, whatever the stenographer has.

Mr. Sutherland: We wish to get these exactly into the record so that there will be no error in it.

The Master: It is understood that the testimony that has gone in then, may be corrected if any errors have occurred, as to show correct excerpts from this book.

Mr. Sutherland: Yes. And to that end may we consider that the book itself in its entirety is offered in evidence?

Mr. Oviatt: That is perfectly agreeable.

(The book above referred to received in evidence, to be considered as Defendants' Exhibit 3, the same being a public document and not marked.)

Q. Now, Mr. Vedder, there is in this book or atached to it the map made by David Finley, or a copy of a map made by David Finley?

A. Yes.

Q. And that shows Lot 21 and Lot 20?

A. Yes.

[fol. 258] Q. And Broadway and Water Street?

A. Yes.

Q And Lake Ontario and the Genesee River, and sub-sections of Lot 21, meaning sections 1 and 2 as indicated in the Finley notes?

A. Yes.

Mr. Sutherland: And it is considered that this Finley map is also in evidence as part of the book.

The Master: Very well.

Mr. Sutherland: It is suggested as a matter of convenience that right here I read from the original notes that part of Finley's notes which refers to the west line of Lot 21 and to its north line. I will read from these original notes at page 106 and page 107.

Lot No. 21 Cont'g 3 $\frac{69}{100}$ Acres

Begin'g at a post standing in the S. E. Corner of said Lot Mark-d $\frac{\text{No 21}}{\text{No 22}}$/II

Thence on the

Courses	Distances Chs.	Lks.	
			South line
N. 61° 45 W.	5	20	over low marshy ground to a ridge of dry land in N. W. & S. E. direction
	5	70	over said ridge to a marsh
	7	20	the marsh to upland
	9	73	thro' thick under brush of Oak & Hickory to a post mark-d H/No 21/No 22 thence on the
[fol. 259]			West line
N. 28° 15 E.	3	20	over upland timbered with White Oak & Hickory to a marsh
	4	40	across the marsh to the beach or sand bank
	5	08	to a post mark-d H/No 21/No 21 standing on the shore of Lake Ontario. Thence on the
			North line
S. 47° E.	5	94	along the shore of said Lake
S. 30° 30 E.	4	20	along the shore of said Lake to a post mark-d No 21/H. Thence on the
			East line
S. 28:15 W.	1	64	to the place of beginning timbered with a few small Poplars.

Area 3 69/100 Acres.

Section No. 1, Lot No. 21, Cont'g 2/100 of an Acre

Begin'g at a Post mark-d H/S. N 21 standing in the N. W. corner of said section. Thence on the

East line

S 11° E.	1	04	along the shore of the Lake to a post mark-d S. 1. No 21/S. 2. No 21/

Courses	Distances Chs.	Lks.	
			Thence on the South line
N. 61 45 W.	66		to a post mark-d H/ S. 1. No 21 / S. 2. No 21
			Thence on the West line
N. 28. 15 E.	84		to the place of beginning.

Area $\frac{2}{100}$ of an Acre.

[fol. 260] Section No. 2. Lot No. 21, Cont'g $\frac{7}{100}$ of an Acre

Beginning at a Post mark-d H/ S. 1 No 21 / S. 1 No 21 standing in the N. W. corner of said section & on the east bounds of Water Street. Thence on the

			North line
S. 61. 45 E.	66		to a post mark-d S. 1 No 21/ S. 2 No 21/ on the shore of Genesee River. Thence on the
			East line
S. 5° W.	93		to a post mark-d S. 2 No 21/ No 22 /
			Thence on the South line
N. 61. 45 W.	1	04	to a post on the east bounds of Water Street mark-d H/ S. 2 No 21 / No 22
			Thence on the West line
N. 28. 15 E.	84		to the place of beginning.

Area $\frac{7}{100}$ of an Acre.

[fol. 261] Q. Mr. Vedder, did you hear the suggestion made by Mr. Cuff to me when he was looking over my shoulder, about what those lines indicate in the surveyor's notes? Do you know Mr. Cuff is a civil engineer as well as a lawyer?

A. I didn't know it.

Q. Well, he is. Have those lines that I call your attention to along on page 108 opposite the marking on the post, the first marking that is indicated there, those four lines up and down, have they any well known meaning among surveyors? Is not that the usual symbol employed in notes of surveyors to indicate that there they came to water?

A. I didn't know that such was the case, it might be.

Q. All right if you don't know it I won't ask you to suppose it?

A. I never ran across them.

(Map produced and marked Defendant's Exhibit 2 for identification.)

Q. Have you seen the government map by Capt. Guthrie and on file in the War Department Engineer's Office showing the progressive changes in the shore line at the mouth of the Genesee River from 1829 down to 1902?

A. I have not.

Q. You would not wish then to pass any judgment as to whether this——

A. Oh, if it came from that office I would be inclined that it had some reliability of course.

Q. Will you look at that and from the scale make an estimate if you can of the distance that the shore line has moved out toward the north between the various periods indicated on that map? Can you take the scale and tell us about how far that progression has made [fol. 262] distance from year to year?

Mr. Oviatt: I wish to object to the use of the words, "shore line", with reference to the map, which manifestly indicates only the edge of the water. The use of the words, "shore line", is going to confuse the issues in this case when the map manifestly indicates only the edge of the water. It is the same character as the suggestion that Judge Sutherland made this morning with reference to one of Mr. Abbot's questions as to the boundary of the lake.

Mr. Sutherland: The map says, "shore line", so I am using exactly what the drawer of the map used.

Mr. Oviatt: The broken line there shows "coast line".

Mr. Sutherland: Very well, call it coast line.

Q. Will you indicate according to the scale of the map how far the coast line went to the north between 1829 and 1844 at the pier, and then at Beach Avenue, and then over at the western edge of the map?

A. This doesn't show Beach Avenue.

Q. Well, taking it along the pier, along the west side of the pier, from 1829 to 1844 what was the distance?

A. About 935 feet.

Q. What is the scale of that map?
A. 200 feet to the inch. Measured along the pier line.
Q. Now, what is the next date indicated?
A. 1870.
[fol. 263] Q. What is the distance between the 1844 coast line and the 1870 coast line, on the edge of the pier?
A. About 50 feet.
Q. From 1870 to 1888, what is the progress made, the distance along the west edge of the pier?
A. 135 feet.
Q. And from 1888 to 1896 what is the distance made?
A. About 150 feet.
Q. And from 1896 to 1902?
A. About 40 feet.
Q. Now, sir, how far is the water or coast-line, whichever you want to call it, today from the shore line of 1829, or the coast line of 1829?
A. It doesn't show it today.
Q. It doesn't show it on that map; I am asking you where it is on the ground?
A. I do not know where it was in 1829.
Q. You don't know how much farther out this coast line has gone from 1920 to the present time, in 20 years how far has that coast line gone to the north?
A. I don't know.
Q. Give an estimate of it from your own knowledge of things down there?
A. That would be only the largest kind of a guess.
Q. Well, I am interested in that?
A. 25 to 30 feet.
Q. You are speaking very modestly when you say 25 to 30 feet?
A. As I remember how things looked along in 1902 I should say 25 or 30 feet.
Q. And that progression of coast line exists all the way from the pier westward along the land involved in this case?

Mr. Abbot: I object to that, the map doesn't show it.

Q. The progression has been uniform, substantially speaking, along that whole front during the period covered by the last twenty years?
A. Well, I have made no measurements, it was simply a matter [fol. 264] of anybody that was a resident of Rochester going down there and observing from time to time some increment there.
Q. And it extended along the entire front of the land involved in this proceeding?
A. I should think so.
Q. And with substantial uniformity?
A. No, it is greatest at the pier and runs out the farther west you go.
Q. Tapers off as you go west?
A. Yes, tapers off.

Mr. Sutherland: I have a certified copy of this map but it is rolled up. I was using this blue-print copy as a matter of convenience.

The Master: Would you mind at this point making calculation of what these several progressions as you call them amount to as a whole? Get some witness to make a calculation of what the total was from 1829.

Q. According to your addition of these figures it makes 1,310 feet from 1829 to 1902?

A. As I scale the total there it is 1,315 feet from one line to the other, or 5 feet discrepancy in all of the different scaling.

Q. And that does not include what has been added since 1902, which you made an estimate of without pretending to be accurate?

A. No, that is just an estimate as an ordinary man, that is not an engineering estimate in any way, shape or manner.

Q. Is there any way that you can think of which will be fairly accurate, to check the coast line of 1829, as indicated on this Guthrie map, with the Shepard or Finley coast line, or shore line or whatever you have a mind to call it, made in 1803, and in 1810? Of [fol. 265] course the pier wasn't there; the pier was projected in 1829?

A. We could approximately, what I mean by that, I mean to say that it would scale within ten or fifteen feet, not closer than that necessarily: we could take our location at the corner of Beach Avenue and Broadway, and scale on those lines as they are indicated by the notes, and give a comparison.

Q. I think we would be interested to see how you would compare the shore line of 1829 as indicated on the Guthrie map with your Finley and Shepard line, shore line. Will you try at your convenience, Mr. Vedder?

Mr. Oviatt: I object to that because manifestly the Finley line is not shown to be a shore line or any other kind of a line: and manifestly the engineering department, when they drew this map, had to take the only available data: whether this map constitutes an interpretation of old records as to where the shore line, coast line, or water line was. Our contention is of course that there is nothing available anywhere to indicate the relative positions of the Finley and Shepard line and the water line at that time. This data is necessarily based upon an old survey line and not upon the place of the water line at the time Finley and Shepard made their notes. So our position is that the significant thing is the water line.

The Master: You could just as advantageously maintain your position if a comparison were made between the Finley and Shepard line and the line on this map of 1829?

[fol. 266] Mr. Oviatt: Yes. That is only my suggestion because counsel was using Finley short line in his question——

Mr. Sutherland: I make no contention upon that point at all.

Mr. Oviatt: I don't want to allow to creep into this case the assumption by Court or counsel that the Finley and Shepard line or the Guthrie line is the shore line at all. They are questions to be determined by the Court after hearing all the evidence.

Mr. Sutherland: I want to offer in evidence a certified copy from the War Department of the map which I have been using with the witness.

(Map referred to received in evidence and marked "Defendants' Exhibit 4.")

Mr. Sutherland: We have a photostatic copy of the government survey made of the harbor in 1829. If there is anything on that which will help the witness in his comparison of the Finley and Shepard line I shall be very glad to let him have it.

Q. Will you look at this copy of the map of the harbor made in 1829, and see if there is anything on that in the way of a landmark which will assist you in comparing the line of 1829 with the Finley or Shepard line?

A. No, I don't see anything.

Examined by Mr. Shepard:

Q. Have you computed the area of Lot 21 as bounded by the Shepard lines, and if so what is the area?

[fol. 267] A. I have had it computed It is 3.17 acres.

Q. Have you computed what is the area of the land bounded by the south line of Lot 21, by the river, by the lake and by the boulevard, the land that is supposed to be above water now?

A. About 21 acres.

Q. That is, that includes Shepard's original land that was bounded by his lines and also the land now above the lake?

A. The increment, yes.

Q. How many acres did you say the present——

A. 21 acres.

Q. Have you computed the area that Shepard includes in the boundaries of Lot 20?

A. 6.89 acres.

Q. Have you computed the land which was in the original Lot 20 plus the land now lying north of it?

A. About 13.43 acres.

Examined by Mr. Sutherland:

Q. What is the area of Lot 21 including sections 1 and 2 on that Water Street end of the Finley map?

A. I don't know.

Q. Won't you please reckon it up?

A. We will have to have time to compute it.

Q. It is a greater area than Shepard made is it not?

A. Yes.

Q. The same thing is true is it not with Lot 20, that the Finley area is greater than the Shepard?

A. Finley didn't make the area of Lot 20.

Q. You are sure that Finley's area in Lot 21 is greater than Shepard's area?
A. I do not know without measuring.

[fol. 268] Examined by Mr. Beach:

Q. The map that you have testified to indicates so does it not?
A. Yes, I think so.
Q. It appears upon the map which you have been testifying to?
A. I beg your pardon; the area of the Finley acreage is on this map.
Q. What is it?
A. 3.52.
Q. What is the area of the Shepard as shown upon that map?
A. 3.17 acres.
Q. So, approximately, what is the difference?
A. It is .35 of an acre.
Q. Mr. Vedder, the Finley map contained in the Greece note book shows a waving shore line, do you notice that?
A. It shows some waving line.
Q. Well, the lines shown upon that map are straight with the exception of a point about at Beach Avenue?
A. Mine are the lines of the notes.

Examined by Mr. Oviatt:

Q. Is there anything in the notes or upon the Finley map referred to, or the maps to which your testimony has been directed, to indicate the lake level at the time the notes were taken or the maps drawn,—the lake level above the sea?
A. No, sir.

Examined by Mr. Sutherland:

Q. You were speaking then of the Finley map?
A. Of the Finley notes. Nothing shows the lake level.
Q. In the map made in 1829 by the government preparatory to building the pier, the soundings are given very extensively are they not: and is there not also a dotted line showing the edge of the sand-[fol. 269] bar running across the river and way out into the lake, and conditions to the west?
A. I have not examined this map.

Mr. Sutherland: I offer in evidence a map of the mouth of Genesee River and the legend reading "Map of the Mouth of Genesee River, New York, exhibiting plan for removing the obstruction at its entrance, by T. W. Maurice, Captain, Corps of Engineers. References: Piers for purposes of removing the obstruction, dotted line—outer edge of bar. 3 and 6, etc., soundings in feet. Erie, Pa. Jan. 22, 1829." I offer the certified copy of that map in evidence.

(Paper last referred to received in evidence and marked "Defendants' Exhibit 5.")

Q. On Exhibit 5 you find a great many soundings indicated by the engineers do you not?

A. I do.

Q. Are you able to follow what the engineer calls the outer edge of the bar by the dotted line showing that situation?

A. Yes.

Q. That bar extends does it not out into the river and later across the entire portion of the mouth of the river between the projected pier, and then goes north and then west?

A. The bar on the west side does. It shows also the former channel running out to the east.

Q. That map, Mr. Vedder, shows the formation of a huge sandbar in what then was the angle formed by the shore of the lake running to the river and the line of the projected piers?

A. What is the scale on this map.

[fol. 270] Q. It is on there somewhere. My question is this—doesn't that map indicate that before the piers were erected in 1829 the engineers found that a great bar was formed under the water in the angle formed by the shore line or sand beach and the line of the projected pier?

A. Yes, I noticed that.

Q. And that sandbar extended across the portion of the water between the two projected piers that appear on that map?

A. Yes.

Q. This indicates along the south shore very shallow water, does it not, for a considerable distance?

A. Yes, quite shallow.

[fol. 271] Q. The land in question is now out of water but covering the area which that sand bar covered when the surveyors made their soundings in 1829?

A. That is just what I want to find out.

Q. Look at it and see.

A. Yes, sir, very approximate.

By Mr. Oviatt:

Q. And the map to which you just referred shows that between that sand bar and the water line there was substantially deeper water?

A. Yes, three or four feet.

Mr. Sutherland: I am not sure we want to agree with the witness on that point, but we won't stop with him now. The figures are all there.

By Mr. Abbot:

Q. Looking at this map of 1829, Defendant's Exhibit No. 5, do you find upon that map any data or indication which shows to what datum the various soundings out here to which reference has been made, are referred?

A. Nothing stated on the map.

Q. So that you find nothing upon that map to show the height or level of the lake with respect to which those soundings were made?

A. No, it seems to indicate the depth from whatever level the lake may have been at that time to the bottom.

Q. Now, Mr. Vedder, are you acquainted with the custom of the old surveyors with respect to the relation between the maps or sketches or diagrams which they drew and the foot note which they [fol. 272] recorded?

A. Yes. The present surveyor makes a map and shows the distances and certain angles and locations from monuments or some other visible thing on the ground and puts it all on his map. The surveyor of the olden time recorded what he did in a series of notes, sometimes in diary form, sometimes in a comprehensive tabulated form which was to accompany a diagram or sketch and maybe numbered the lots. That was the general practice in this locality.

Q. So that if I understand you correctly the notes and the diagram constitute the map and not the diagram alone; is that correct?

Mr. Sutherland: I object to that as calling for the conclusion of the witness and an interpretation not allowable by the fact.

The Master: I think the question is leading anyhow. Ask him what it does indicate.

Q. What does the so-called diagram indicate?

Mr. Sutherland: I object to that question as incompetent, no proper foundation for it, calling for a mere estimate without sufficient data.

Mr. Abbot: He has testified that he knew of the custom as to the way in which the ancient surveyors plotted the material which they gathered and recorded the material which they gathered and he stated what that custom was and that is already in.

[fol. 273] The Master: Assuming that what do you propose to show by the witness?

Mr. Abbot: I want to show by the witness that the notes and the diagram together constitute what we would now call a map and that the notes are an integral part of the diagram and are to be read with it according to this custom which he says he knows.

Mr. Sutherland: I object to that, your Honor, as having no proper basis on the evidence in the case, calling for a mere guess on the part of the witness as to what the custom was one hundred years ago, and we have before us maps without any notes, we have notes without any maps and we have both maps and notes, so that from the foundation before us there is nothing to permit this question, and, furthermore, I think the witness is incompetent to testify what a custom was one hundred years ago when he was not living.

The Master: I am inclined to think that the witness is not competent to give us any valuable information on that subject, and also that the testimony sought to be adduced has not been given any foundation or basis in any issue in the case, but that all being true I do not see any harm that can be done by having the witness answer it.

[fol. 274] Mr. Sutherland: I take an exception to your Honor's ruling.

A. I think the notes together with the diagram should be taken as a record of what the surveyor did.

Q. And that is based upon your knowledge of this custom to which you have referred?

A. Yes, sir.

Q. From what source did you get your knowledge of this custom?

Mr. Sutherland: To shorten the matter up, your Honor has admitted the surveyor's notes. We all know they are competent in any case, the proven notes of a surveyor, field notes, are received in evidence, and they have been received in evidence here. We do not question their competency. It is for your Honor to say how much weight shall be given to them. We do not question the competency of these notes at all.

The Master: I am not inclined, Judge Sutherland, to exclude the testimony. Let it go in over your objection.

Mr. Abbot: I withdraw the question.

Q. Have you had occasion, Mr. Vedder, to examine the field notes and maps made by a number of ancient surveyors in this region around here?

A. I have.

Q. What do you find with respect to the recording upon a plat or diagram, when one is made, of the materials found in the notes?

Mr. Sutherland: I object to that as immaterial and irrelevant.

[fol. 275] The Master: It will go in over your objection.

Mr. Sutherland: Exception.

A. In examining the survey of the Elisha Johnson wall map of Carthage, the thousand acre tract so-called—a map was made and the notes which was simply a diagram showing their general relation, and then the notes were in note form recorded in 1917. Frankfort, just north of Rochesterville, wall map, I think there were some notes on the map showing distances. On the Rochesterville map there was a statement by the surveyor in the County Clerk's office, showing certain sizes and distances of lots. The last two maps about 1910 or 1911.

Q. Mr. Vedder, in one of your previous answers you used the date 1917 with respect to Johnson; do you desire to correct that?

A. Pardon me, 1817. If I said 1910 or 1911 I meant 1810 or 1811.

By the Master:

Q. Mr. Vedder, when were these piers actually built, do you know?

A. Only by repute. The first pier, by repute along about 1829 or 1830.

Q. Which one do you mean by the first one?

A. I mean the pier that extended out probably a little beyond where the present shore line is.

Q. Do you mean the west pier?

A. I think one or both sides. The west pier today was built first, I think.

Q. When was the east pier built?

[fol. 276] A. I cannot tell exactly; I think about the same time. Then they were extended again in the Fifties.

Q. Have you any information that would help us in determining whether or not the construction of those piers accelerated in any way the recession of the lake?

A. No, sir.

Q. You don't know anything about it?

A. No, sir.

Q. There has been used here in these maps and in the questions of counsel on both sides four expressions; "shore", "beach," "coast line," water's edge." Do those expressions mean to your mind as a surveyor four different things?

A. Until this case came up as an ordinary municipal surveyor, which I am, the definition of "coast line" or "coast" had never come—we had never come in connection with it. We would ordinarily define it as any person not technical would define it as somewhere on the beach where it would strike the slope toward the water.

By Mr. Oviatt:

Q. What is this, shore or coast line?

A. Shore line I have been so informed. It is not a mark, it is an area between high and low water mark. Before that time it had never been called to my attention.

By the Master:

Q. What do you understand by the word "beach?" Is that the same as "shore line"?

A. No, it is more extended; it extends back further in the town of [fol. 277] Charlotte. We might take the term "beach" to mean almost anything—as far as the sand extended.

Q. What is the difference between "coast line" and "water's edge?"

A. I do not think there is any.

Q. I would like to understand the fact here from you. In answers to questions you have stated that the waters of Lake Ontario have been receding to the north for many years?

A. I do not think that that is what I meant to say if I said it that way. What I meant to say was that the land has been growing out to the mouth. I do not mean that the waters have been receding. I do not mean there is any difference in the elevation today, as between now and twenty years ago,—that the general elevation of the lake has changed. It may change between high and low water. What I mean to say is that the sand has drifted in until the angle between the pier and the highlands to the west, and also on the other side, between the pier and the highlands to the east, that there is quite an angle there because the river had a rounding mouth.

Q. In other words, do you mean that the land might well gradually encroach upon the water and extend farther and farther to the north without any varying of the level of the lake as compared with the ocean level?

A. Yes, sir, and that is the way I wish my testimony to be understood.

[fol. 278] By Mr. Sutherland:

Q. What is the source of your information as to this divergence that you have indicated between "coast line" and "shore line" and "water line" and "beach?"

A. I simply stated, as his Honor asked me what I understood by it, before we came into this case and without any prejudice or anything about the case.

Q. You say you were informed, since this case came into existence, that these distinctions are made; now what is the source of your information; who told you that?

A. I guess I have heard Mr. Shepard make the statement.

Q. Mr. Albert Shepard, the Deputy Corporation Counsel?

A. I think so. The distinction means "shore."

Q. So that is what you are basing your testimony on as an expert here as to the distinction between "beach," "shore line," "water line," and "coast line", the advices received from Mr. Albert L. Shepard.

A. Not all of those. I simply said shore line.

Q. Now, Mr. Vedder, don't you know that the writers on the subject of land titles bordering on the water say that on fresh water lakes shore line means the point where land and water come together?

Mr. Oviatt: I object to that as introducing in evidence scientific treatises not properly proven.

The Master: I think that is proper cross examination.

A. I don't know that.

[fol. 279] Q. Have you studied any writers on that subject of what those terms mean when applied to fresh water lakes?

A. No, sir.

By the Master:

Q. Mr. Vedder, you understand I am asking you these questions seeking to get from you information as an engineer; if you are surveying a piece of property along the line of a lake and there was handed to you field notes of somebody else who had surveyed, or many surveyors, and I do not mean many students of words but many surveyors, is there any difference between the expressions, if you know, of those four words I have used?

A. I have stated to your Honor exactly my knowledge of the thing. I have made no extended study on the matter of coast line. We do not have it to deal with very often. I am a municipal sur-

veyor and I have stated what my knowledge of it was when the case started.

Mr. Sutherland: Now with very great respect I ask your Honor to strike out the witness' testimony as to the distinction between those terms in view of the statement that he has received his advices on that subject from Mr. Shepard, the Deputy Corporation Counsel.

Mr. Oviatt: There is a little confusion in the progress of this examination. The witness has stated in parts of his testimony that [fol. 280] this was his knowledge before the case started, and then in response to Judge Sutherland he stated that some specific portion of his testimony, his information on that, did come from Mr. Shepard. I think the testimony will be reasonably clear and should not be stricken out. The witness' testimony upon the rereading will be found to have been acquired before the case started, and then with reference to the coast line he received some information from Mr. Shepard.

The Master: All the witness' statements are on the record.

Mr. Sutherland: Exception.

By Mr. Oviatt:

Q. You have stated that you have seen this beach widened, and you have stated that you did not mean to imply by your testimony that the beach had widened anything with reference to either any change in the high level of the lake from year to year or the low level of the lake from year to year; am I correct?

A. That is my observation.

Q. In other words, you stated nothing about the lake having changed either with respect to the point the waters rise when highest or the point to which they recede when lowest?

A. No.

By Mr. Beach:

Q. Mr. Vedder, you said in answer to the Master's question as to the tendency to fill up in that corner after the pier was erected that [fol. 281] you had no knowledge of that; now I ask you do you know the prevailing current of the lake at that point; do you know which way it flows?

Q. From the west?

A. Yes.

Q. In other words, the water enters the lake on the west end at Niagara Falls and goes out at the east end at the St. Lawrence River?

A. Yes.

Q. And in addition to that, do you know the prevailing winds down there?

A. Northwesterly, I believe.

Q. Northwesterly?

A. Northwesterly, southwesterly and westerly.

Q. Now, the operation of the current and the operation of the prevailing winds would tend to throw sand into that corner formed by the pier and the lake shore; isn't that true?

A. I naturally expect it would.

Q. And the map which is in evidence indicating a bar in that territory would corroborate that statement, wouldn't it, sand bar and shoals?

A. No; the map was made before there was any pier there. It was a projected pier.

Q. But that indicated the mouth of the Genesee River which came into the lake at that point?

A. Yes.

Q. Now, to your mind does not that indicate that the Genesee River tended to bring sand down there and deposit it at the mouth?

A. Some part.

Q. Now, Mr. Vedder, you stated that the term "beach" might mean a large section; when it is described as a beach or said bank [fol. 282] would that not indicate that it was land or territory washed by the water?

A. It might mean a spit of sand lying between a marsh and a lake.

Q. In other words a line of solid land between the marsh and the lake?

A. Yes, sir.

Q. That is what the surveyor's notes would indicate?

A. I didn't say that. I said that is what it might indicate.

Q. Did it indicate a beach or sand bank at that point?

A. No, it says along shore.

Q. It said to the beach or sand bank and then to the shore?

A. All right.

Q. Now the sand bank or beach which you now say might be a spit, that would naturally be formed by the flow of the water washing in sand at that point, would it not?

A. Yes.

By Mr. Sutherland:

Q. Mr. Vedder, are you acquainted with the conditions which exist at Olcott Beach, at Sodus, at Pultneyville and other places where piers have been built at the mouth of streams into the lake with regard to the forming of sand accretion at the angle between the shore and the pier built in that way?

A. I haven't made a study of them, no, sir.

Q. You know then, as a fact, do you not that at those places I have mentioned there has been a gradual building out of the land by the coming in of the sand?

[fol. 283] A. I have only seen them casually years ago.

ALONZO S. WESTON, called as a witness on behalf of plaintiff, having been first duly sworn, testifies as follows:

Direct examination.

By Mr. Oviatt:

Q. Mr. Weston, will you tell us how old you are?
A. I am sixty-eight years old.
Q. And what is your business?
A. Well, I used to be a railroad man but have done nothing in late years.
Q. When you were a railroad man what particular occupation did you follow?
A. Road Master.
Q. Were you ever employed by the New York Central Railroad?
A. Yes, sir.
Q. And for how many years?
A. Oh, thirty-five I judge.
Q. Can you tell us about the period that that thirty-five years covered?
A. In a general way, yes.
Q. In about what year did your employment with the New York Central begin?
A. Way back in the Seventies.
Q. Are you familiar in a general way with the New York Central having laid down a bal-oon track at the point north of Beach Avenue and east of Lake Avenue?
A. I am.
Q. Did you have anything to do with the laying of that track?
A. I had supervision of it.
[fol. 284] Q. In what year did that occur?
A. That I would not say. In the Eighties, but I don't remember when.
Q. Will you tell us what preparation was made for the laying of that track?
A. We carted old ties on the swale and filled the same in and then we covered that with dirt. That was the preparation prior to putting down the track.
Q. Will you tell us about how many ties you drew in?
A. Thousands of them in a general way.
Q. Did you lay them more than one deep?
A. Oh, yes, in some cases.
Q. And how deep were they in the deepest part?
A. That I would not say; it is a good many years ago.
Q. How large an area was covered by the place where you dumped the ties, can you tell us?
A. No, I cannot. That you will have to get from the engineer's office. Of course, I had nothing to do with that part of it.
Q. Where did you draw the ties from?
A. Off the Niagara Falls Division which was a stretch of road from

Rochester to Suspension Bridge. They were old ties which were removed and used for that purpose.

Q. They were old ties which at one time had spikes attached to them?

A. Yes, we either used them for that purpose or burned them up.

Q. After throwing in these ties what did you do?

A. We covered them with dirt.

[fol. 285] Q. Where did you get the dirt?

A. At the Charlotte Road.

Q. How far from Beach Avenue?

A. We took a steam shovel there and dug it from the bank.

Q. Can you tell us how far it is in miles south of Beach Avenue that you put your steam shovel?

A. No, I cannot.

Q. Was it more than a thousand feet?

A. Oh, yes, approximately I should say from one-half to three-quarters of a mile. I am simply guessing that part of it.

Q. How did you carry that material from the location of the steam shovel?

A. On cars.

Q. Lay a temporary track?

A. Yes, we had to lay a temporary track.

Q. How much of this material, this dirt, did you carry down?

A. That I could not say: a great big quantity: I couldn't say what number of yards.

Q. Do you know how deep you laid it on top of those ties?

A. In some places two feet and some more. We tried to level it up.

Q. That is, it varied from two to four feet?

A. I would not say that. Understand me, it is many years ago. To my best knowledge, yes.

Q. Were these ties and this material that you have testified to thrown in north of Beach Avenue?

A. Towards the lake.

Q. Prior to the building of the balloon track, so called, where did the railroad end?

A. It ended there this side of the blast furnace and we had tracks [fol. 286] leading from it into the blast furnace.

Q. And that blast furnace is some distance south of Beach Avenue?

A. Yes, sir, quite a distance.

Q. And when you say this side, you mean the south side of Beach Avenue?

A. Yes, that is where the track terminated before it was extended.

Q. Do you know of any filling in which was done prior to the time when the balloon track was put in?

A. Not to my knowledge, no, not upon this land in question. Of course we had it filled in on a straight piece to get to the upland, that is south of Beach Avenue.

Q. That is, you did some filling south of Beach Avenue?

A. Yes, sir, it was necessary.

Q. How long before you filled in the ties north of Beach Avenue did you do it south of Beach Avenue?

A. We had to do it south before we could do it north.

Q. Why?

A. Because the track extended from the south to the north.

Q. Now tell us the condition of the land on which you put the ties and the dirt prior to the time you filled it in?

A. It was swampy.

Q. Were there periods of the year when there was water there?

A. Yes.

Q. That is, the swamp filled in with water?

A. To a certain extent. That I am in no position to say because I never went down there only when I laid the track. I had no occasion to go there.

[fol. 287] Q. So that you don't know the condition prior to the point of time when you started to fill in?

A. No sir, not any knowledge at all.

Q. Did this fill that you placed there on top of the ties consist of gravel and sand?

A. Well, no, it was more or less sand that we dug out of the bank there. It was sandy soil.

Cross-examination.

By Mr. Sutherland:

Q. How far did this marsh extend, Mr. Weston, to the south from where Beach Avenue is now located. You will remember that Beach Avenue in 1870 was further to the south than where it is now. I am speaking of the present location of Beach Avenue. How far south of that did this marsh extend which you say you filled up?

A. I didn't say that. Let me say to you before I go any further with all my day's work I had nothing to impress it upon my memory out of the ordinary.

Q. Do you know where the Spencer House was located?

A. I do, sir.

Q. Was that standing down there when you did this filling in of the marsh?

A. Yes sir.

Q. The Spencer House was north of the marsh that you say you filled up?

A. Yes sir.

Q. That stood on dry ground did it not?

A. Yes sir.

Q. And north of the Spencer House was quite a stretch of dry ground until you got to the lake?

A. Between that and the pier.

Q. Now listen: north of the Spencer House, between the Spencer House and the lake, was dry land, was it not?

[fol. 288] A. Just locate your points first. By north you refer——

Q. By north I mean toward the shore of the lake. Now, between the Spencer House and the shore of the lake was dry land was there not?

A. As my memory serves me, yes.
Q. And south of the Spencer House was dry land for a distance?
A. For a distance, that's right.
Q. And then you came to a low, swampy area?
A. Yes sir.
Q. Now I want to ask you how far toward Broadway that swampy area extended which you say you filled up, how far toward Lake Avenue?
A. It really commenced at Lake Avenue, so to speak, in a small way, and the water used to accumulate at that point. We laid two large pipe level with Beach Avenue, as I remember now, to draw the water there and from there to the river.
Q. You drained it with tile?
A. Two 36-inch tile.
Q. So that that water would run from the swamp into the river.
A. And also from the road there.
Q. Did you find cattails and stuff like that in this swamp?
A. That I don't know.
Q. Do you remember what kind of swampy vegetation was there?
A. No sir.
Q. How wide was this swamp from east to west?
A. That I couldn't really say.
Q. There was dry land where they had mapped out a street called Water Street or River Street, wasn't there?
A. I don't know as I am conversant with that.
Q. River Street?
A. Toward Broadway?
Q. Out toward the river; do you remember where that River Street [fol. 289] goes down and then bye and bye disappears into land that had a sort of path across it?
A. That is gone from my memory.
Q Do you remember old Beach Avenue, where it used to be in that time?
A. Beg pardon.
Q. You remember where Beach Avenue used to be in the 70's?
A. Yes, in a general way.
Q. And that led from Lake Avenue——
A To the river.
Q. And in front of the Spencer House?
A. Yes.
Q. So that the Spencer House was south of Beach Avenue, Beach Avenue was between the Spencer House and the lake and north of Beach Avenue there was more land between Beach Avenue and the lake—wasn't there?
A. Yes.
Q. Now, Beach Avenue is considerably to the south where the old line of Beach Avenue was?
A. Yes.
Q. But south of the Spencer House there was dry land and then you came to a marshy area?
A. Yes.

Q. And that marshy area being surrounded by dry land was filled up by you for the purpose of laying this track and you threw into that low place which was surrounded by dry land a great quantity of ties and dirt and other material to level it up with the surrounding country: that's correct, isn't it?

A. That is correct, sir.

Q. For the purpose of laying the track on it to make a firm foundation?

A. Certainly, you could not lay the track without the ties.

Q. That was in the 70's some time?

A. I wouldn't say as to the date.

[fol. 290] Mr. Sutherland: I want to show the witness, your Honor, a map of the village of Charlotte, contained in the County Atlas, published in 1872, at pages 31 and 32. There will be no question but what this Atlas was brought from the county clerk's office and is in constant use here.

Mr. Oviatt: Your mere production proves it.

Mr. Sutherland: Thank you so much.

Q. Mr. Weston, will you kindly look now at this map of the village of Charlotte, and indicate to the Court, without defacing the map, about where this swamp was that you filled up?

A. Well, I should judge in here. (Witness indicates on the map.)

Mr. Oviatt: Wait just a moment. I want it on the record that the witness has indicated with his finger a circle from Lake avenue to the river.

A. I'm locating it simply because this man had a little restaurant, a little house or something there, and he was in that point back there—Mart McIntyre.

Q. Is Mart McIntyre's beach house indicated on that map?

A. Yes.

Q. Don't you know that McIntyre's house preceded the Spencer house?

A. No, sir, I do not.

Q. Don't you know the Spencer House was built after Mart McIntyre's white fish place was removed, burned down?

A. I may in a general way.

Q. Now, the Spencer House was there while you did this work?

[fol. 291] A. Yes, sir.

Q. It wasn't Mart McIntyre's place?

A. No, no, sir; it was not. It was gone.

Q. Now, do you see where Beach avenue is outlined on this map as of 1872?

A. Does that represent Beach avenue (indicating a point on the map)?

Q. Yes.

A. I see that, yes, sir.

Q. And here is the stream you observe running down through out into the river?

A. Yes, sir, I see that.

Q. A stream originating and running to the west of the village of Charlotte, through a hollow, and then turning to the right and running into the river?

A. Yes, sir.

Q. Now, be careful about this, please, and indicate as well as you can where this swamp was or low place that you filled in with your ties.

A. Well as a matter of fact I'm very chary about doing that. You give me the blue print of the tracks as then laid and then I will do it.

Q. All right, we will do that. Let's have the county map of 1902, showing the balloon track in existence.

Mr. Sutherland: May I have this map marked in evidence, your Honor, or considered in evidence?

The Master: Very well.

Mr. Moser: What page is it?

Mr. Sutherland: It is page 31 of the County Atlas, of 1872.

[fol. 292] (Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit Number 6.")

Q. I show witness blue print showing the location of the balloon track. We will verify this later by Mr. Gray, who drew it from the actual location.

A. Mr. Gray, if my memory serves me, staked out this track.

Q. Yes, he did. William C. Gray was the engineer who laid out this track, did he not?

A. Yes, sir, the man who staked it out, yes, sir.

Q. Now, will you indicate where, with reference to the loop or balloon track, you put in this fill?

A. Well, north of this point here.

Q. North of present Beach avenue?

A. Yes.

Q. And how, with reference to old Beach avenue?

A. I am confused by the streets. This is the present one (indicating on the map).

Q. This is present Beach avenue, there is where the old Beach avenue was, and over here to the right is where the——

A. (Interrupting.) Oh, do I understand that is the Beach avenue which existed when this track was laid, or this one? Which?

Q. This one here (indicating on the map.)

Mr. Oviatt: No, no. There is no proof of that. We don't know that.

A. Well, I don't know that. That is rather misleading to me. There are two Beach avenues. Which one do you refer to, gentlemen? This is the Spencer House. It must be this because un-

[fol. 293] doubtedly that was the road leading, as I should imagine, to the Spencer House.

Q. Yes. Well, that was called Beach avenue in the old days, wasn't it?

A. Well, that was the abandoned native hole. It was in this radius all around here.

Mr. Oviatt: The witness is now pointing to a line making a circle.

A. Which represents the track, this being a three hundred foot radius, or about a nineteen or twenty degree curve, which Mr. Gray can verify as to that.

Mr. Oviatt: May it appear upon the record that the witness in response to the questions of the area filled draws his finger around a circular line running from Beach avenue, northwesterly, then northeasterly, around close to the river, close to the Spencer House, and returns to Beach avenue as relocated.

A. We run so close to the Spencer House in laying this track, if my memory serves me right, we had to cut off a piece of the stoop to get by with the car at this point here.

Q. Now, how much of the area within this loop indicated on this map was swamp at the time you made this fill?

A. As my memory serves me, in here, in a general way (indicating). Now, over here——

Q. (Interrupting.) Now, please tell me how much of it; a third, a half, quarter, or how much.

A. Well, Judge, you're asking things that are a great many years [fol. 294] ago, and, as I said before, in all my day's work I had nothing to impress upon my mind to retain the knowledge which you wish me to give you. I couldn't tell you that.

Q. You saw some stables marked within this circular area?

A. Yes, sir.

Q. Were they there when you made this fill?

A. I don't know.

Q. You see a roadway leading from Lake avenue toward the Spencer House?

A. Yes, I do.

Q. That wasn't swamp, was it?

A. No. Otherwise you couldn't use it.

Q. Certainly. It would not be a useable road if it was swamp.

A. No, I appreciate that.

Q. Is it not a fact, Sir, that the low places occupied only a small fraction of this area within this loop, and principally along the line of that creek that ran into the river, and which you tiled and made an underground water passage of; now, isn't that the fact?

A. No.

Mr. Oviatt: Get the whole question, Mr. Weston.

A. I only want to analyse it, gentlemen. This testimony I am giving you is something that taxes my memory pretty strongly. Well, approximately about half, I'd say. Now, understand, approximately. I use that term.

Q. All right.

A. Because I'm simply basing my opinion upon the amount of material that we used for this purpose.

Q. Now, there were some large willow trees growing all through this area?

A. Yes, there were trees, Sir.

[fol. 295] Q. And growing right out of what you call the swamp?

A. Yes.

Q. Growing right in the swamp?

A. Yes.

Q. And you filled in between these old willow trees?

A. Yes.

Q. How old did they look to you to be, back in the 70's?

A. I am no judge, Sir.

Q. Oh, yes, you know a tree, whether it is a young thing, just stuck out, or an old veteran tree. These were old veteran trees, weren't they?

A. Makes a difference with the species of trees; some grows faster than others.

Q. I know it. Willow is a fast growing tree, perhaps. Weren't they old willows in there, as compared with young trees? They were veterans, weren't they?

A. I am not going to answer that question because I don't know.

Q. Were they large about the trunk?

A. Oh, I don't know. They were large about the trunk; not as large as they are at the present time.

Q. I warrant that's so. That's 1870. I wasn't as large around the trunk as I am now. Now, how about the trees? They were large trees as compared with small ones?

A. I would not testify to that.

Q. Do you remember, Sir—Now, try to tax your memory—as to whether there were stables on this area?

A. I can't recall it; I can't recall it.

Q. How far, now, to the south did this filling in go?

A. Well, right up here on the top of the hill, so to speak, was a round-house and a turn-table and a tank. I was then on the track. It was necessary to build this track going over here further on [fol. 296] a tangent, and we called it a straight line. Well, understand me, about fifteen hundred or two thousand feet, maybe such a matter. The track terminated at this point because all that was necessary was that they could use this and then turn around and go back to Rochester.

Mr. Oviatt: May it appear upon the record that the point referred to by witness is at the bottom of the map where the balloon track is shown to connect on what on the map?

Witness: Right here (indicating). Here is the balloon track, I should say fifteen hundred, two thousand feet further north.

Mr. Oviatt: Yes. I ask to have marked for identification the map to which the cross-examination was directed.

Mr. Sutherland: Very well. I want to ask one more question.

Q. Between the road running to the Spencer House and the lake was a stretch of dry land, was there not?
A. There was.
Q. Over the whole area?
A. Yes, sir.
Q. Now, how far would you say it was from the road leading from Lake avenue to the Spencer House—How far was it from that road to the water's edge, when you laid that balloon track?
A. Well, that was—Just take a scale and scale there and I could answer that question. I can't.
Q. All right. You would not give your memory of it at all?
A. No.

[fol. 297] Mr. Sutherland: You want that marked for identification.

Mr. Oviatt: Yes.

(Whereupon the map referred to was marked, "Plaintiff's Exhibit 5," for identification.)

Q. Mr. Weston, you said that there were thousands of these ties drawn in.
A. Yes, sir.
Q. Over how great an area would you say that fill-in extended?
A. Well, it makes all the difference how deep the ties is laid.
Q. I beg your pardon?
A. It makes all the difference, Judge, how deep the ties is laid.
Q. I know it, but I am speaking of the area now. You started away south of present Beach avenue, didn't you, for that fill?
A. Present Beach avenue?
Q. Yes.
A. Yes, sir.
Q. You began filling away south of where Beach avenue now is?
A. Well, it was necessary to fill to get down to the beach.
Q. I know it is necessary——

Mr. Oviatt: He is talking about laying temporary track on the beach.

Witness: It it was necessary to lay temporary track on the beach.

Q. You filled that in there, didn't you?
A. Yes.
Q. All ties?
A. Oh, no; not above here.
Q. Where did you begin to use the old ties?
A. After we got over here.

[fol. 298] Mr. Oviatt:: Pointing north.

Mr. Sutherland: Let the witness tell where it was.

Mr. Oviatt: I don't want to lose the value of his testimony. If I do, the record won't mean anything. The witness, when he said, "Here" was pointing to the area between the present Beach avenue and the balloon.

Witness: We used slag for the purpose of filling in south of Beach avenue.

Q. Now, Mr. Gray worked with you all that time, didn't he?
A. Mr. Gray was engineer.
Q. On the job all the time?
A. That is as far as the engineering was concerned. He didn't do any laborious work.
Q. He was there, wasn't he?
A. Yes.
Q. Performed his duty?
A. Oh, he sure did, yes, sir.
Q. As an engineer on that work?
A. Yes, sir.

By Mr. Beach:

Q. You laid a great many of these ties around to make a smooth, level foundation for the balloon track?
A. Yes, to a certain extent, but where we didn't we filled that up with dirt, which we found could be done.
Q. There were hummocks around there?
A. Yes.
Q. Low marshy spots?
A. Yes.
Q. You leveled it off with the ties and dirt to make it a level spot?
A. Leveled it off with the dirt because we couldn't with ties, being different thicknesses.
[fol. 299] Q. That gave a level balloon track all around?
A. Yes. It was necessary, as I said before, to put this material here to hold this sharp curve because you couldn't lay the track upon the other ties because there was nothing to hold it there in line.
Q. Exactly. And the marks on the map, parallel lines just north of Beach avenue, was location of where you put the tile?
A. Yes, sir.
Q. There was a natural stream of water coming down there?
A. Yes, Lake avenue. You will find two tiles running parallel to each other from that point over to the river.
Q. And as the stream was there before you put in the tiles the water spread out over considerable territory?
A. Yes, especially when there were rains.
Q. That was marshy where that water spread?
A. Yes.
Q. That's why you put in the tiles?
A. That's why we put it in, to take the water from that point.

Redirect examination (to Mr. Oviatt):

Upon this Plaintiff's Exhibit 5 I show you two points on the north side, one indicating Number 20, and the other, Number 3; and I ask you if you did anything in constructing that balloon track be-

tween those two points, so far as filling in on the outside was concerned.

A. After the construction of the track we found the water had a tendency to wash the track, and I brought a number of carloads of large stone from the Lewiston Road and put them on the outside of this track, between the track and the lake, to keep the track from [fol. 300] washing away.

Q. That is, after the track had been laid you found water washing it and undermining it?

A. Yes, on the storms from certain quarters.

Q. And then you dumped several carloads of stone in there to protect that against that wave action?

A. Yes, sir.

FRED GREER, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Oviatt:

Q. How old are you Mr. Greer?

A. Sixty-nine.

Q. Where do you live?

A. Charlotte, Twenty-third Ward.

Q. And the Twenty-third Ward of Rochester is what used to be the village of Charlotte?

A. Yes, sir.

Q. How long have you lived in Charlotte?

A. I was born there.

Q. Have you spent all of your life down in that locality?

A. Only when I was sailing in the summer.

Q. And when you were sailing in the summer was your home in Charlotte?

A. Yes.

Q. How far back does your memory go, to what year?

A. Well, I learned to scull a boat in 1865, the year of the flood.

Q. And do you remember conditions with varying accuracy back to 1865?

A. Yes. I can remember pretty near all that was going on along the water.

Q. I call your attention to that area east of Lake avenue and north of where Beach avenue is now, and I ask you to tell us as [fol. 301] nearly as you can recollect, what the condition of that area was in 1865, and in following years. Just give us a description in your own way.

A. Before the furnace was built, well, that was all marsh east of the furance.

Q. That is, south of Beach avenue?

A. South of Beach avenue.

Q. Yes. All right.

A. And there was no Beach avenue then. We used to go up around in a boat sometimes and go back in up in back of the Holden property. There was just a little lane that Wilder used to have to drive out to his farm, but when the water was high he couldn't get to it, he had to go the other way; and there was a channel across, and we used to go up that channel in a boat, away up back across from where the Catholic church is and the Holden property on the west side of the street and in that hollow in there. It was all marsh from Farnum's Dock clear down to where Beach avenue is now, and a little above it. They could not drive across where Beach avenue is now on the east side of Lake avenue them days.

Q. Why couldn't they drive on Beach avenue east of Lake avenue in those days?

A. Because it was all muck and mud and water.

Q. And what was there north of Beach avenue in those days, so far as dry land or water or marsh was concerned?

A. There was a sand bar north of it.

Q. And what was between the sand bar and where Beach avenue is now, if anything?

A. Well, there was water.

Q. How deep was the water?

A. Oh, sometimes it would be six inches, sometimes two foot, just [fol. 302] according to the height of the water.

Q. The height of the water of the lake?

A. Yes.

Mr. Sutherland: No, no. The witness didn't say of the lake.

Q. The height of the water? What water were you referring to?

A. What?

Q. What water were you referring to?

A. Why, the water in the river, that would raise the water there.

Q. And do you remember any structure or cabin known as McIntyre's?

A. Yes.

Q. What was the way in which the McIntyre place was referred to down there?

A. Why, we used to go down there in a boat, and sometimes we would go down Lake avenue and there was a little plank bridge there sometimes, and then, other times there was plank, and we walked down across the plank and you would get on to that sand bar, and then we got down to his place.

Q And where was the bridge from Lake avenue to get on to that sand bar?

A. Well, I think it was just about on the north side of Beach avenue now.

Q. And what was that bridge across?

A. Oh, it was just a bridge across so the teams could go over.

Q. And what was underneath the bridge, water or land?

A. Water.

Q. Was that bridge the only way in which you could get across to that sand bar?

A. Well, most always.

Q. Mostly always?

A. Yes.

[fol. 303] Q. When the water was high in the lake was that the only way you could get across?

A. That was the only way.

Q. The only way?

A. Low water you could wade across.

Q. Was there any name which was used to designate this sand bar that you say McIntyre was on?

A. Why, no; not that I know of; only south of there was the Island where the piers first started to be built on. That's across from the furnace. The furnace company built a roadway down there, and they had wooden tracks and trucks that they used to draw their iron ore up, and they kept filling in with cinders until they got a wide place there.

Q. Who was McIntryre, do you know?

A. Why, McIntyre, Mart McIntyre.

Q. What did he do?

A Why, he kept a little restaurant down there, rented boats and fish poles and such as that.

Q. Do you know who was on that sand bar, if any one, before McIntyre was there?

A Yes. There was a man married a relative of mine sold it to him.

Q. What was his name?

A. Zack Nelson.

Q. And do you know how long Zack Nelson had been there before McIntyre?

A. No, I do not.

Q. Did you know Zack Nelson?

A. Yes, sir.

Q. Do you know how deep the water under this bridge would get when the water of the lake was high?

A. Oh, it would come up pretty close to the top of the bridge; sometimes the bridge was flooded.

[fol. 304] Q. Do you know how deep that water would be when it got to the floor of the bridge?

A. Well, I don't know that; I never measured. Mart improved it afterwards so people could get out there.

Q. Who?

A. Mart McIntyre improved it after that so people could get out there.

Q. What did he do to improve it?

A. Oh, he filled in, and he dug a ditch down through and planted willow trees so the water in the marsh would go out the other way.

Q. And where did he fill it in?

A. On the north side.

Q. And what is this ditch that you speak of?

A. Why, to let the water off. Sometimes it would wash over the bridge and fill in down there and wash through and flood, so he dug a ditch clear down to the river and planted willow trees on both sides of the ditch. That was south of his place.

Q. You say the water used to wash over? When did it wash over?

A. Oh, when there would be a big nor-easter, like that.

Q. And what did it wash over?

A. Over this wharf.

Q. What place down there did it wash over?

A. Why, that was up west of Bartholomay's.

Q. And do you know anything about whether the water would wash up to the McIntyre cottage or not?

A. Yes.

Q. What do you know on that subject?

A. Oh, I have seen it.

Q. Seen what?

A. Water washing up there.

Q. To the McIntyre cottage?

A. Not out of the lake, but out of the river.

[fol. 305] Q. Out of the river?

A. When the seas would come in the river there.

Q. Do you know what sort of a foundation the McIntyre cottage had?

A. I think it was on posts.

Q. You spoke of rowing up some place in a boat; what place was that?

A. That was the road through the marsh, east of the furnace, and we would go down to Beach avenue and row up through there on the north side. There was just a lane there then, there wasn't no Beach avenue, and then up through that marsh in back of the Holden property.

Q. Where was the Holden property?

A. Right almost across from the Catholic church.

Q. And where was the Catholic church?

A. On Lake avenue.

Q. And where with reference——

A. Right where the light house is, the old light house, right across from that on Lake avenue.

Q. Now, can you tell us where the Spencer House was located with reference to where the McIntyre place was?

A. Yes. It was a little west and a little north.

Q. And how far west or north?

A. Oh, well, I couldn't tell. McIntyre was pretty close to the pier, and the Spencer House was farther back.

Mr. Sutherland: I don't know whether the witness means to say whether the Spencer House was north and west of McIntyre's house——

Witness: It was west.

[fol. 306] Mr. Sutherland: Or McIntyre's was north and west of Spencer's.

Witness: It was west.

Mr. Sutherland: Spencer House was west of where McIntyre was?

Witness: A little, not much.

Q. Have you ever seen it occur that the water was all around the McIntyre place?

Mr. Sutherland: I object to that upon the ground it is leading, your Honor. He ought not lead the witness.

A. I couldn't say as to that. No, I don't know as I ever did.

Q. Do you know when it was that McIntrye went into possession of this place down there?

A. Into where?

Q. Do you know when it was that McIntyre first went on that bar?

A. No, I do not.

Q. Are you familiar with the traditions of Charlotte, as to whether Nelson was a squatter or not?

A. Yes.

Mr. Sutherland: I object to that.

A. He said he was a squatter.

Mr. Sutherland: "He said he was a squatter." I object to that.

The Master: I don't think that's proper.

Mr. Oviatt: What?

The Master: I don't think you want to prove what the tradition was as to whether Nelson was a squatter, do you?

Mr. Oviatt: I am quite sincere in this, if your Honor please. I [fol. 307] am not at all certain of my position. But where you have occupancy of that kind, and all the witnesses are dead, and it relates to public boundaries, I take it that it is a well defined exception to the hearsay rule, and that the declarations of any individuals, as an individual, on that subject were competent, and the composite declarations of the community in the form of tradition are competent as an exception to the hearsay rule relating to public boudaries and matters of public interest.

You see here we have a case of where there is a public boundary between the State of Massachusetts and the State of New York. We have also all the witnesses dead. Now, as I understand it, that permits testimony—For instance, I could ask this witness, if I desired to go so far, as to what Tom Jones had said in 1865. That being true, I take it that the tradition gives a more dignified character, and reputation gives more dignity, so far as the testimony in its legal effect is concerned, to the declaration.

The Master: Read the question.

(Whereupon the question was read by the stenographer.)

Mr. Sutherland: Objected to as incompetent.

Mr. Moser: And hearsay.

Mr. Sutherland: Yes.
The Master: I think he may answer.
Mr. Sutherland: I take an exception.
[fol. 308] The Master: If he knows what the tradition was. Answer the question specifically, whether or not you know.

Q. Do you, or don't you, know? Just answer the question, "Yes," or, "No."
A. I heard Zack Nelson say——

Mr. Sutherland: No, that is not the answer.

Q. Do you know?
A. Not for a fact, I don't. Only hearsay, what he said himself.
Q. Do you know what the people said about it?
A. Yes; that was the talk of the family.
Q Now, what did they say?

Mr. Sutherland: I ask to have that stricken out, your Honor,—"that was the talk of the family."
The Master: I think it is quite incompetent, but I am not inclined to strike out testimony nor to rule very strictly on its admission.
Mr. Sutherland: I take an exception.

Q. Now, did you have any talk with Nelson himself as to his title or right to that place? "Yes," or, "No."
A. No.
Q. You never did?
A. No.
Q. You never talked with Nelson?
A. I talked with him but not as to his title or anything like that.
Q Well, on the subject of whether he was a squatter or not.
A. Well, he said he was.
Q. You did have a talk with him?
[fol 309] A. He said he was the first man who sold beer down there when he squatted there. That's all I know.

Mr Sutherland: I move to strike that out, your Honor.
Mr. Oviatt: Well, that's an admission against interest. That's a declaration against interest by Nelson.
The Master: It couldn't go in on any such ground as that.
Mr. Sutherland: He doesn't ever say Nelson said anything about his title.
Mr. Oviatt: I have lost the thread of the proceeding. Is there an objection unruled on?
The Master: There is a motion to strike out, and against the motion to strike out you remark that this was a declaration against interest.
Mr. Oviatt: Yes.
The Master: I said it couldn't come in on that ground.
Mr. Oviatt: Oh, I see. You refuse to strike it out on some other ground?

The Master: I will let it in, although I don't think it is competent on any ground.

Mr. Sutherland: I take an exception. Is it stricken out, your Honor, or does it stay in the record.

The Master: It is in the record.

Mr. Sutherland: I take an exception.

Q. Do you know how long Nelson and McIntyre, together, re-
[fol. 310] mained on that sand bar?

A. No, I don't.

Q. Do you know what happened to McIntyre when he moved off?

A. Why, he sold it.

Q. McIntyre sold it?

A. Yes.

Q. And to whom did McIntyre sell?

A. To Captain Burns.

Q. Who?

A. Captain Burns.

Q. And what did Captain Burns do in that location?

A. He built the Spencer House.

Q. Now, do you know when McIntyre got his place?

A. When he got it?

Q. Yes.

A. No, I don't.

Cross-examination (to Mr. Sutherland):

Q. McIntyre occupied a building or buildings that stood on dry ground, didn't he?

A. Yes.

Q. And between him and the water of the lake was a considerable stretch of dry ground?

A. I don't know what you call considerable.

Q. Well, there was a space of ground which was dry and visible, sand beach, if you wish to call it that, between McIntyre's north side of his building and the water's edge of the lake, wasn't there?

A. Yes.

Q. How far did that extend as you remember it in 1865?

A. Well, not very far.

Q. I don't know now what you mean by "not very far."

A. Well, I can't tell you what you call——

Q. Well, you look from one corner of the court room to the other, and say if it was as far as that.

A. It might have been a hundred feet.

[fol. 311] Q. It might have been a hundred feet?

A. Yes; and sometimes not that; just according to the lake.

Q. Well, a hundred feet of sand and dry ground between McIntyre's house and the water's edge, on the average?

A. Yes.

Q. Back there?

A. Something like that.

Q. Now, as time went on that kept increasing, didn't it, in width?

A. Yes.

Q. And today it is out——

A. A long ways.

Q. Hundreds and hundreds of feet from where McIntyre's house stood in 1865?

A. Yes, sir.

Q. Now, how much dry ground was there between McIntyre's house and the edge of this swamp?

A. Well, when I first knew it——

Q. South of McIntyre's.

A. South?

Q. Yes.

A. Well, when I first knew it there wasn't over fifty feet.

Q. Fifty feet?

A. Yes, and sometimes there wasn't any.

Q. Now, I want to ask you about this swamp. That extended considerably to the south, towards where the furnace is?

A. Past it, clear to Farnum's Dock.

Q. All right. There was a stream of water that ran down the hollow or valley or gulch, or whatever you're amind to call it, west of the village of Charlotte?

A. Yes.

Q. West of Lake avenue?

A. Yes. It run down and it run up. When the water was high in the river it would run up.

[fol. 312] Q. Now, listen. The water came down the creek west of the village of Charlotte, and made its way into this swamp; now, isn't that so?

A. Yes. And then it went the other way.

Q. Now, wait a minute. You have told about going in a boat——

A. Yes.

Q. And following that swamp line or water line, crossing Lake avenue, going up west of the village of Charlotte, until you got opposite to where the Catholic church is.

A. Pretty near.

Q. Now, when you did that there was still dry land between the marsh and the lake shore, wasn't there? Call it sand or beach or whatever you're amind to.

A. There was where Lake avenue is.

Q. Yes. That was on dry land, wasn't it?

A. Certainly.

Q. And that ran to the lake?

A. No, not all the time.

Q. Well, it ran until it met water?

A. There was a channel. There was a place across Lake avenue you could get in a boat.

Q. All right. And you say that in your boat you did cross Lake avenue?

A. Yes.

Q. But when you crossed Lake avenue and followed that gully up opposite the Catholic church there was still dry land——

A. On each side.

Q. On each side?

A. Yes.

Q. There was dry land between this low space where you went with your boat and the lake?

A. Yes.

Q. Now, how wide was that dry land?

A. On, on the north side of Beach avenue?

Q. Yes.

A. Oh, it might have been fifty feet sometimes, and sometimes less.

[fol. 313] Q. All right.

A. Sometimes there would be a hole through it.

Q. A hole through it?

A. Yes.

Q. From this marsh into the lake?

A. Yes.

Q. Is that what you mean?

A. Yes.

Q. Now, at what time did you see that sand bar broken?

A. Oh, I have seen it eight or ten times.

Q. When there was a big storm?

A. Yes.

Q. And that washed up?

A. Yes.

Q. So that a connection was made then for a time between the lake and this marsh?

A. Yes.

Q. And then that filled up again?

A. Yes.

Q. And you would have a continuous dry beach along the lake shore?

A. Sometimes.

Q. Between the marsh and Lake Ontario?

A Yes.

Q. Now, the water from this creek came down to the west of the village of Charlotte and worked its way into this marsh, did it not?

A. Sure.

Q. Now, did any water from the Genesee River get into that marsh?

A. Yes.

Q. Where did it come from?

A. Between the island and Farnum's Dock.

Q. How far south of where Beach avenue now is was the point where you say some river water at times got into this marsh?

A. From the furnace, or from Beach avenue?

[fol. 314] Q. How far south of where Beach avenue now is was

the point where you say occasionally water from the river got into the marsh?

A. Just north of the railroad bridge. That got in there before the railroad bridge was built.

Q. That was the point where the water from the river got into the marsh?

A. Yes.

Q. Just north of where the railroad bridge now is?

A. Yes.

Q. How far north of it, would you think?

A. Why, right along side of it, at that abutment there.

Q. All right. How wide an opening did that high water make when the water got in from the river into this marsh?

A. A hundred feet.

Q. There was a hundred feet opening there?

A. Yes. There was an island. That's where the furance company built their dock, on that island.

Q. Now, I want to ask you again, how wide was the place up by the railroad bridge where water from the river occasionally got into this marsh.

A. About a hundred feet.

Q. Now, you speak of an island up in there somewhere.

A. Yes.

Q. Where was that?

A. Just on the north side, where the channel is, on the north side of the channel into the marsh.

Q. Leading into the marsh?

A. Yes.

Q. There was an island?

A. There was an island. Quite a few schooners used to come out of there.

Q. What did you call it?

[fol. 315] A. An island, where the pilot trees was.

Q. Pile of trees?

A. Pilot trees. There was a house on that island belonged to the Government.

Q. How far south of Beach avenue was that railroad bridge?

A. Oh, I never measured it.

Q. Well, I never did, but I'd like your judgment.

A. Well, I don't know; I couldn't tell you.

Q. Half a mile, isn't it?

A. I think pretty near.

Q. Pretty near half a mile. Now, in dry seasons this marsh would pretty nearly dry up, wouldn't it?

A. No.

Q. Always water in it?

A. Always water in it.

Q. What grew in there, cattails and that stuff?

A. Cattails and flags.

Q. Yes.

A. And there would be open water and there would be fish.
Q. Fish get in there, did they?
A. Yes. We used to catch them.
Q. How big an area of cattails was there on this marsh?
A. I never measured that.
Q. You remember, don't you, when the Spencer House was built?
A. Yes.
Q. What kind of foundations did they put under the Spencer House?
A. Why, I think they put stone.
Q. Stone foundation?
A. I think so.
Q. The Spencer House burned up?
A. Yes.
[fol. 316] Q. Do you remember that Beach avenue lead from Lake avenue right up to the Spencer House?
A. This Beach avenue that's here now?
Q. No, the old Beach avenue.
A. Oh, the old Beach avenue.
Q. Yes.
A. The Spencer House was built after Mart got it filled in, got his road there.
Q. Did McIntyre build a road from Lake avenue out to his place?
A. I don't know when he built it. He built it as good as he could, a sand road.
Q. What did he put on the road, do you know?
A. Sand, gravel and things like that.
Q. Between that road and the edge of the lake, when McIntyre was there, was a strip at least fifty feet wide?
A. Yes.
Q. Now, anywhere between Lake avenue and McIntrye's house did that road cross a little bridge over the stream or marsh?
A. It was on the north side of where Beach avenue is now.
Q. How wide a bridge or crossing did he build over that little marsh?
A. Oh, I guess about eight or ten feet.
Q. The marsh narrowed down to a narrow neck right there, didn't it?
A. He filled in, or the village filled in some, and he filled in some on both sides, and then put that bridge in there to let the water out.
Q. Don't you know that the marsh is always shown on the old maps as narrowing up right at that point?
A. I haven't seen any old map.
Q. Haven't you ever seen any of these old maps?
[fol. 317] A. No. All I know is just what is in my head. I saw one that looked something like it once, but I don't know.
Q. Don't you know that McIntyre got a deed from the English heirs of his property there?
A. No, I never heard of that.

Q. Never heard of it?
A. No.
Q. If you saw a record of it, would that refresh your collection of it, do you suppose?
A. No; I never heard that he did.
Q. How much of the marsh did McIntyre fill in?
A. Oh, he didn't fill in so much. The New York Central filled it in with ties.
Q. Well, I know we have heard about that, but, now, you are the man who remembers when McIntyre was there.
A. Yes.
Q. How much of the marsh did McIntyre fill in?
A. He didn't fill in much.
Q. Tell us what you mean by that.
A. Well, I don't think he filled in hardly any. He filled in the north side mostly.
Q. The north side of what?
A. The north side of the road.
Q. North side of his road?
A. North side of that ditch that he had down that road.
Q. The ditch did not run north of his house; it ran south of his house.
A. I know it, but that's where he filled it in.
Q. Between the ditch and his house?
A. Along there.
Q. You say there was about fifty feet of dry land south of McIntyre's house before you came to the marsh?
A. Sometimes the water went right up to the house.
Q. Now, Mr. Greer, is that where he filled in?
[fol. 318] A. That was when the water went down.
Q. South of his house, between this marsh and his house?
A. Oh, he filled in along side the road.
Q. Where did he pasture his cows?
A. Gosh, all the cows used to pasture out on the island, swim out and wade out.
Q. Where did he pasture his cows?
A. I don't know; I never worked for him.
Q. Did McIntyre have a stable there?
A. I think he had a horse there some place.
Q. McIntyre didn't fill in Lake Ontario, did he?
A. No, he didn't go up that way, I don't think.
Q. Now, when was it McIntyre planted trees there?
A. Why, along his road and along the ditch.
Q. Weren't there trees there before McIntyre planted any?
A. I presume a few, I don't know.
Q. Well, you remember, don't you, whether there were trees in there?
A. He put them there, the most of them.
Q. Well, there is a tree there with seventy-three rings in; do you claim that you saw that planted?
A. No, I don't.

Q. How old are you?
A. I'm sixty-nine, that's all.
Q. Weren't there good sized trees down there when McIntyre lived there?
A. Well, yes, middling sized.
Q. Middling size? You don't claim he planted them, do you?
A. I don't know anything about that.
Q. Did Nelson stay in this place till McIntyre went there?
A. I don't know; I was only a kid.
Q. You don't remember when Nelson was there?
[fol. 319] A. Why, I have been there when he was there, but I don't know whether he owned it.
Q. You don't know whether his occupation was continuous on up to the time that McIntyre went in?
A. No.
Q. Did you see McIntyre build anything there at all?
A. Not that I know of; I have heard.
Q. Where did they dry the nets in McIntyre's time for the white fish?
A. Mostly always on the east side.
Q. Mostly on the east side of the pier; any on the west side at all?
A. On the east side of the harbor; very seldom; once in a while.
Q. Once in a while they drew the nets on the west side of the pier?
A. Yes.
Q. In front of McIntyre's place?
A. Not there. There was too many logs in front of McIntyre's. You mean seines
Q. Were there a lot of logs out in this shallow water in front of McIntyre's house?
A. Yes.
Q. That is in the angle between the shore and the pier, in the shallow angle, there were a lot of logs out there?
A. The pier would catch them.
Q. They would be floating around on the lake and they would get in there?
A. Lodge there.
Q. They would lodge there?
A. And be buried up with sand.
Q. And sand would cover them in the course of time?
A. Yes.
Q. You saw that yourself, with your own eyes?
A. Yes. I saw lots of logs laying there.
[fol. 320] Q. You saw lots of logs?
A. Yes.
Q. Floating into that angle?
A. Yes.
Q. And then become buried with sand?
A. Well, I didn't stay long enough to see them buried.

Q. Don't you know that the sand covered them?
A. Not so quick as I could be looking at them.
Q. No, no; but didn't you see those logs when they were being submerged gradually from the sand from time to time?
A. Yes; but I don't know whether they were the same logs or not.
Q. Some logs were covered with sand?
A. Yes, lots of them.
Q. That's the reason why you couldn't use the nets out there, because that corner caught so many floating logs?
A. Couldn't haul a seine there at all.
Q. Couldn't haul a seine there at all?
A. Had to go above.
Q. Now, year by year, as that filled in, the sand filled up that corner, the shore of the lake extended out, didn't it?
A. That is what I think put it there.
Q. And you have seen that shore extend from McIntyre's time, out to the north, steadily and gradually, year by year, from that time down to the present time, haven't you?
A. Yes.
Q. And there have been hundreds and hundreds of feet added to that beach by the gradual action of the waves, bringing sand into that corner for all these years, from McIntyre's time down to the present time?
A. Yes.
Q. And the shore, because of that fact, is gradually grown out toward the north?
A. Yes.
Q. Do you remember, of your own recollection, when Nelson was [fol. 321] living on this place?
A. I've seen him there when I was a kid, down there with my father, but I don't know whether he lived there.
Q. Well, somebody was living there?
A. Well, I don't know that. They had boats, oars, fish poles, and the like of that.
Q. Wasn't there a shack there?
A. Yes, he had a shack there.
Q. Somebody had a building there, whether it was Nelson's or not, you don't know?
A. No.
Q. You saw Nelson around there?
A. Yes.
Q. After a while McIntyre went in there and stayed there?
A. Well, that I couldn't say.
Q. How big was this island that you have been talking about, away up by the railroad bridge?
A. Why, I couldn't tell you.
Q. As big as this room here?
A. Oh, larger. There was a house on it.
Q. There was a house on it?

A. Yes. And my grandmother boarded the man in the house that worked on the pier, when it started.

Q. Was the island in the river or in the marsh?

A. It was in the river.

Q. The river?

A. The river run right along side of it.

(To Mr. Beach:)

Q. Did the stream that came down from the west during the wet seasons and after heavy rains, bring a considerable body of water down?

A. Yes.

Q. Quite a flow?

A. Yes. And then when the water would rise in the river it would work up the other way.

[fol. 322] Q. And that would spread out over this marsh land?

A. There was always water in the marsh.

Q. But this water that came down that creek from the west, that would spread out over this low, marshy land in there?

A. Yes.

(To Mr. Oviatt:)

Q. Upon cross-examination you referred to the fact that the village did some filling, McIntyre did some filling, and that they put the bridge there to let the water out; am I right?

A. Yes.

Q. And from where was the water let out by that bridge?

A. Why, it came out of that swale up in back there.

Q. The marsh?

A. Yes.

Q. And this water that was let out under the bridge was the water that was flowing from the marsh into the lake, or from the lake into the marsh?

A. From the marsh into the river and then into the lake.

Q. Then into the lake?

A. Into the river, and then went from the river out into the lake.

Q. And about how wide was this water when the water was high, that was let out from the marsh into the lake?

Mr. Sutherland: Now, I object to that witness as the witness hasn't said that the water went from the marsh into the lake.

Mr. Oviatt: It is exactly what he said, in those precise words.

Mr. Sutherland: No. It went from the marsh into the *the* river, and then from the river into the lake.

[fol. 323] Mr. Oviatt: I will submit to the Court the answer of the witness.

Witness: I told you the water came into that ditch and went down into that channel that went down into the river, and into the lake.

The Master: Now, do you mean by that, it went into the river first, and then into the lake?
Witness: Yes.

Q. Oh, you mean it went into the river, and the river took it out into the lake?
A. Yes.

Mr. Oviatt: Oh, I beg your pardon.

Q. And this water that you speak of is the water from the creek that you are now speaking of?
A. Yes. When the water raised in the river it would flow up that creek, and then when the water was low in the river it would go out of that creek.
Q. And where did the village fill in?
A. Why, I think the town had it then, and they filled in some, and Mark filled in some when he built that bridge across there so the water could run in under it and run into the river and down there, and he could get to his place.

The Master: By Mark, you mean McIntyre, do you?
Witness: Yes.

Q. You haven't testified yet about any filling in by the New York Central, have you?
A. Oh, they filled in hundreds of loads of ties and earth.
[fol. 324] Q. And by "loads," what do you mean,—wagon loads or carloads?
A. Carloads.
Q. Do you know what area, where the place was that they filled in?
A. I couldn't tell you; all the rest of the marsh that the furnace company didn't fill in.
Q. What had the furnace company dumped in the marsh?
A. They dumped slag and old brick stuff when they tore down the cupola.
Q. I asked you on my direct-examination about what McIntyre's place was called. Now, was there any particular word that was used about McIntyre's place?
A. We used to say we would go down to Mark's.
Q. Go down to Mark's?
A. Yes.
Q. And that was when he was running this restaurant?
A. Yes.
Q. Was the McIntyre place ever referred to as an island?

Mr. Beach: I beg to object to that as leading.
The Master: I think that's improper.

A. We never used to bother our head much about whether it was an island or not as long as we would get there.

Mr. Oviatt: Well, if your Honor thinks that is improper I won't pursue it, of course.

The Master: Well, if there is anything further you want.

Mr. Oviatt: My idea on that is this, that where a place had passed into the terminology of the community, and where the designation was so simple and so readily understood as the word, [fols. 325 & 326] "island," is, that if a place was referred to by a community generally as an island, it would carry with it by implication considerable proof as to whether or not it was in fact an island. A community such as this is very apt to be correct in its terminology in so simple matter as an island.

The Master: Yes. But that ought to be proven by asking the witness what it was called, and not by telling him what it was called.

Mr. Oviatt: Oh, I beg your pardon. I didn't appreciate it.

Witness: Will you let me explain about that island, please?

The Master: Yes. Go ahead.

Witness: The island was where the house was west of the furnace—to the east of the furnace. There was an island there maybe three hundred feet long.

Q. I see.

A. Then, when we got to build the piers they built their cribs on that island, and my grandmother kept the boarders in that house that built there.

A. I see.

A. And the piers extended from that island out. Now, what the island was, as far as McIntyre was concerned, I don't know that they ever called that an island or not. I know I have seen the time when we had to go there in boats.

(At this point, 5:00 o'clock, P. M., an adjournment was taken to September 26th, 1923, at 10:00 o'clock, A. M., at the Court House.)

Next Plaintiff's Exhibit, No. 6.

Next Defendants' Exhibit, No. 7.

[fol. 327] ARCHIBALD H. PRESTON, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

By Mr. Sutherland: What is your full name, Captain Preston?

A. Archibald H. Preston.

Q. Where do you reside?

A. Oswego, New York.

Q. What is your occupation?

A. I am an overseer for the United States Corps of Engineers, War Department.

Q. How long have you been engaged in that work?

A. Thirty six years.

Q. Are you in charge of the United States Government dredge now operating at the mouth of the Charlotte harbor?

A. Yes sir.

Q. Where does that dredge operate? How great a territory does it cover in the course of a year?

A. It operates from Oswego to Buffalo.
Q. Along the south shore of Lake Ontario?
A. Yes, and part of Lake Erie.
Q. Have you yourself been with the Government dredge during that length of time as it operated in the mouth of the Genesee River at the harbor?
A. I have been with the dredge for about twenty-four years.
Q. And have you in the course of your work, done dredging at [fol. 328] the mouth of the Genesee?
A. Yes sir.
Q. Then I take it that because of that Experience and occupation and your official duty, you have observed from year to year during that time the filling in of the harbor?
A. Yes.
Q. Have you observed, or can you tell the Court what the movement of the water is in Lake Ontario, along the south shore, whether from the west, or the east?
A. The prevailing Current of the lake is from West to east,—the drift is that way.
Q. That is so along in the various harbors that you have visited?
A. Yes that is so all along the south shore.
Q. Did you have charge of the extension of the west pier in the Charlotte Harbor at one time?
A. I had charge of the repairs to the west pier in 1887. In 1892 I dredged a channel for the extension of the north end of the west pier about three hundred feet long.
Q. Will you tell the Court what you observed in relation to the existence of shoal water as the pier was extended out into the lake?
A. The west pier was extended into deeper water than prevailed at the end of the pier. It was thought that by extending it 300 feet farther, it would get it out into 16 or 18 feet of water; and it gradually shoaled out as far as it was built.
Q. What was the character of the material that you excavated at the entrance of the harbor at the end of the piers? What was the character of the material that you took out of the water between [fol. 329] those piers?
A. It is lake sand and river silt. The current of the river meets the current of the lake and whatever it brings down with it, drops out.
—. Will you repeat that statement as to the character of the material that you excavated at the mouth of the harbor?
A. It is lake sand and river silt, just at the end of the piers the current of the river bringing down the silt meets the waters of the lake and loses its force, and it drops it there. Beyond the pier two or three hundred feet, we get lake sand.

The Master:

Q. What do you mean by silt?
A. It is mud, practically, when it is wet.
The Master: Any clay in it?
A. It is a clay substance, enough to make it sticky.

The Master: What is the color of it?
A. Black, or gray.
The Master: It is entirely distinguishable from the sand?
A. Yes sir.

Mr. Sutherland:

Q. Does this filling-in process go on every year?
A. Yes sir.
Q. So that it is necessary to keep up an annual dredging at the mouth of the river, in order to make a channel for incoming and out-going vessels?
A. Yes sir.
Q. How far up the river have you excavated with your dredge?
[fol. 330] A. About 3,200 feet south of the end of the west pier.
Q. As you go farther south, I suppose the amount of silt increases in proportion to the lake sand?
A. Oh, yes.
Q. Have you observed the character of the bottom of the lake from year to year, on the west of the pier?
A. I have been over west of the pier once with the dredge, when we dug sand there.
Q. What comes in west of the pier is lake sand, is it?
A. Yes sir.
Q. What have you observed, Captain Preston, as to the drifting in of sand on the west of the pier at Charlotte during the time that it has been under your observation?
A. There has been a gradual accretion there at the beach. How much, I could not say. I never measured it. I observed it with my eye. From year to year there will be come changes. Some years there is not as much, and some years there is more; but there is a gradual accretion.
Q. A gradual growing out of the shore towards the North?
A. Yes sir.
Q. And you have seen that during the entire period that you have been visiting Charlotte in your official duties?
A. Yes sir.
Q. Have you observed the action of the wind on the sand, as it has washed up on the shore, and drifted?
A. A strong wind will blow sand almost like snow, drift it, and pile it up in drifts.
Q. And you have seen that when the wind was strong?
A. Yes.
[fol. 331] Q. What is the direction of the prevailing winds in that locality, as you have observed?
A. Well, the prevailing wind of the lake is generally given as west.
Q. That is, coming from the west?
A. Yes, coming from the west. The accretion on that beach is made more with northerly and northeasterly winds. They wash direct and square on it.

Q. What is the angle with the north and south meridian of the government piers there, are you able to state?

A. They are just about north-east and south-west.

Q. Just about forty-five degrees to the east from the north and south line?

A. Yes sir.

Q. So that a north wind would set in about that angle formed by the pier and the shore of the lake?

A. Yes sir.

Q. And you have observed the fact, you say, as I understand, that as the sand drifts in to the shore and the strong winds come, that that sand is blown back upon the land to the south?

A. Yes sir.

Q. As the snow is driven by the wind?

A. Yes sir.

Q. When did you first observe conditions at Charlotte?

A. I came there first in 1874.

Q. Were you then in the Government service?

A. No sir, I was attending a yacht, a pleasure trip.

Q. Since that time, from 1874, down to the present time have you observed, as the years come and go, a gradual growth of the shore line out toward the end of the pier?

A. I was first engaged in pier work in 1879, and the shore now [fol. 332] has moved out quite a little from what it was at that time, out north.

Q. And that is true to some extent of the entire shore line west of the pier, running out to where you get to the land at the bluffs?

A. Yes sir.

Q. Will you tell us, if you have not already done so, what you observed as to the growth outward of shoal water west of the pier during these years?

A. I don't understand that.

Q. Have you observed the depth of the water west of the Pier?

A. No sir, I never have. I have taken soundings for several years in the river, detailed soundings, for mapping the water there.

Q. But your duty did not require you to make soundings to the west of the pier itself?

A. No sir.

Q. As a matter of fact, are you able to state to the court whether, in the absence of any piers at that point, the habit of the river, in bringing down silt, meeting the current from the lake, and the drift inward of sand, would cause a commingling of the silt and sand, and the spreading of the commingled substance out on the right and left, or on the west and east of the mouth of the river?

A. I think it would.

Q. You think it would?

A. I think the lake would wash up sand, if there were no piers there, until it closed the mouth of the river, and it would stay there until a flood opened it up. That condition prevails just west of Fair Haven, here.

[fol. 333] Q. Will you tell us whether or not you have observed the drifting in of said and the growth outward by accretion, of the shore line at any other places along the south shore of Lake Ontario?

A. The same conditions prevail at Great Sodus and Little Sodus as are present at Charlotte.

Q. Little Sodus is what is ordinarily called Fair Haven?

A. Yes.

Q. And you have piers there extended out into the lake?

A. Extending north and south.

Q. And west of the pier you have discovered a gradual growth outward of the shore line?

A. Yes.

Q. By the drifting in and filling in of the sand?

A. Yes.

Q. Great Sodus and Little Sodus are on the south shore of Lake Ontario?

A. Yes.

Q. Little Sodus is west of Great Sodus?

A. No, east of Great Sodus. Great Sodus is thirty two miles east of Charlotte.

Q. Is there a similar condition at Olcott Beach?

A. Yes, there is.

Q. Piers extend out into the lake there?

A. Piers extend out to the north there.

Q. And you have observed that the shore west of the pier there has been growing out into the lake?

A. Yes.

Q. By the drifting in of the sand?

A. Yes.

Q. Olcott Beach is also on the south shore of Lake Ontario?

A. Yes.

Cross-examination.

By Mr. Oviatt:

[fol. 334] Q. When did you say you first began to dredge down there at the mouth of the river?

A. I began dredging first in 1892.

Q. And when you began to dredge, whereabouts did you dredge?

A. I began in the river, south of the ferry, and dredged to a stated depth of water in the lake.

Q. And that dredging consisted in dredging up the silt carried down by the river.

A. Yes, between the piers; silt and sand, as it meets the lake.

Q. This river, you have observed it in the spring, have you?

A. Yes.

Q. It is very muddy, and filled with silt?

A. Yes.

Q. It carries down a large quantity of silt every year?

A. Yes sir.

Q. Do you know about how much?

A. Well, now, I can't state in yards; but we take out about sixty thousand yards every year, out of this narrow channel. The channel is 150 feet wide only.

Q. And that is the silt which is carried down by the freshet of the river in the spring?

A. Yes sir, the silt that extends out to the end of the piers. A part of it is sand, I think. We go some eleven hundred feet north of the end of the west pier, that is sand, no silt in it.

Q. This silt is carried along by the rapidity of the flow of the river till the flow of the river is checked?

A. Yes.

[fol. 335] In other words, so long as you have a movement of the water in the river, the silt is carried, and when you check that, the silt is dropped?

A. Yes sir.

Q. And that results in accretion at the mouth of all the streams emptying into the lake, the dumping of the silt after the current is stopped by the lake waters?

A. Yes.

Q. And it is that condition which requires the Government to annually dredge, in order to keep the mouths of those streams open for navigation?

A. Yes, only at Great Sodus, there is no river entering there. Dredging there is due to the drift of the lake itself.

Q. How far up the river have you ever dredged?

A. About thirty-two hundred feet from the end of the west pier. That would bring it about three hundred feet south of Beach Avenue.

Q. As the river approaches the lake, its current becomes less and less?

A. Yes, it widens out.

Q. So that most of the silt is dropped where the current is slowest?

A. Yes.

Q. And the amount of silt dropped where the current begins to slacken is less than the amount which is dropped as the current becomes slower out farther?

A. Yes. The heaviest of it is dropped.

Q. You mentioned something about dredging a channel for the west pier?

A. Yes sir.

Q. That is, you dredged a channel to get down to a depth to lay [fol. 336] the foundation for the pier?

A. Yes sir.

Q. How deep did you dredge that channel?

A. We went about four feet below the bottom of the lake.

Q. The sands on the bottom of the lake to a depth of fifteen or sixteen feet are in agitation during storms, are they not?

A. Yes sir.

Q. That is, they swirl around with the movement of the water?

A. Yes sir.

Q. And when you have silt carried down by a stream and dumped

into the lake water at a depth of fifteen or sixteen feet, in a storm the sands become mixed with the silt?

A. Yes sir.

Q. So that if you have the silt carried out and falling to the bottom of the lake, if the agitated sands rise, the sand mixes with it, then the composite material raises the bottom of the lake?

A. Yes sir.

Q. And it is the silt that adds to the quantity of material, is it not?

A. Not necessarily. It is right here.

Q. It is the silt brought down by the river which adds to the material at the bottom of the lake at the mouth of the river?

A. Yes sir.

Q. Although that material by reason of the agitation of the sand does become mixed with the sand?

A. Yes sir.

Q. Do you know about the rapidity of the flow of the river between the piers?

A. No, I do not. I never interested myself in that. The flow is only during the freshet in the spring months. When I am here [fol. 337] there is little if any flow, unless we have a storm up in the headwaters of the river. Then we get a small current, but I never measured it, never interested myself.

Q. You spoke of the movement of the waters of Lake Ontario. What you mean by that is the passage of the waters which come over Niagara Falls and go down the St. Lawrence?

A. Yes sir.

Q. When they reach a body of water as wide as Lake Ontario is at the mouth of the Genesee River, the flow of the waters of the lake is imperceptible?

A. No, you wouldn't notice it, unless it is preceding a storm.

Q. And then the flow is caused by the wind?

A. Yes, a surface current.

Q. The actual flow of the water not caused by the wind, but caused by the intake and outlet of the water is imperceptible?

A. No, you wouldn't notice that.

Q. How often do you dredge out the river, Captain?

A. Once a year. I have been dredging it twenty-eight years, with the exception of about five years from 1905; but then it was dredged in those years. I was not with the dredge at that time.

Q. And you select the time of your dredging as the time after the spring freshet?

A. Not necessarily. We begin at Oswego and dredge out all these other harbors coming west. The fall of the year is the best time to dredge here.

[fol. 338] Q. But that dredging is taking out the silt not that comes down when the river has little or no flow, but it is taking out the silt that is brought down in the spring?

A. Yes sir.

Q. There was only one occasion when you dug sand to the west of the Pier?

A. Yes, that's all.

Q. Will you tell us the location of that dredging?

A. I should say it was about 100 feet west of the pier, in about half way to the shore.

Q. Is that particular location used for navigation?

A. No sir.

Q. I don't remember that you spoke of the fact as to how far out from the end of the pier you have dredged?

A. About eleven hundred feet.

Q. How far out from the northernmost limit of the pier is the silt carried in any degree at all?

A. We have some years found it out four or five hundred feet. Other years it would be out a hundred to two hundred feet.

Q. The level of the floor of Lake Ontario changes from time to time, does it not?

A. Well, it might, along the shore. That is the only thing I could say. But the deeper waters of the lake I know nothing about. I never have sounded near the shore, only from observation, where the sand drifts in.

Q. You find frequently within two or three thousand feet of the shore of the lake that sand bars will form in considerable depths of water?

[fol. 339] A. My experience only covers in the case of Fair Haven, Little Sodus and Big Sodus. That is sand there, and I know that bars form out there in fifteen, sixteen and eighteen feet of water.

Q. And those bars will change their location, and disappear?

A. Sometimes.

Q. In other words, the lake action with reference to those bars is one which creates the bar and destroys the bar?

A. Yes sir.

Q. Through a short period of years, perhaps?

A. Yes sir.

Q. So that the character of the bottom of the lake, so far as its contour lines is concerned, changes from time to time?

A. I should say so, in some cases. Where the bottom is stony or rocky there is no change. But where there is a deposit of sand, as there is here, and Sodus Point and Fair Haven, you will find changes. West of Sodus and Fair Haven the bottom of the lake is rocky, and east of Fair Haven around Oswego the bottom is rocky and there is no change.

Q. You spoke of having noticed the beach widen out in several places, notably Fair Haven and Great Sodus?

A. Yes.

Q. You have noticed that the widening of that beach is a widening of the sand strip along the water line?

A. Yes sir.

Q. That is, the sands which are called the beach are the sands which increase in area?

A. Yes sir.

Q. And where there was a narrow strip of sand before, you later [fol. 340] have a wider strip of sand, or beach?

A. Yes.

Q. So that the width of the beach itself widens?
A. Yes.
Q. You spoke of a westerly drift, I think.
A. Yes sir.
Q. Is it this westerly drift which causes, or in part causes the formation of these sand bars on the bottom of the lake under water?
A. I think so.

Examined by Mr. Sutherland:

Q. Captain, just one observation. I show Captain Preston defendants' exhibit 5. You will observe, Captain, that it is a map made by the War Department Engineers in 1829, the legend being: "Exhibiting plan for removing the obstruction of the entrance to Genesee River"?
A. Yes.
Q. Those are the proposed piers, and the dotted line, showing outer edge of the bar?
A. Yes sir.
Q. Then "Soundings in feet"?
A. Yes sir.
Q. Now you can trace, you see, the edge of the bar, as indicated by the dotted line?
A. Yes, these are contour lines. Here we have seven and six tenths; here you have a spit running out five feet, gradually increases to 8, 12, 14, and 16.
Q. I would like to have you indicate to the Court from the soundings as they are recorded there where the navigable channel was before any of this obstruction was removed.

Mr. Oviatt: I object to that, because this is an 1829 map.
[fol. 341] Mr. Sutherland: It is merely from the soundings.
Mr. Oviatt: These are 1829 soundings.
Mr. Sutherland: I want to find out from that map from somebody that can point it out where is the deepest channel from the river out into the lake, as indicated by that map. We can figure it out ourselves.
Mr. Oviatt: You mean in 1829?
Mr. Sutherland: According to that map right there. What was the best course for a boat to go out to the lake, with those soundings as they existed then, not as they are now.
Mr. Oviatt: Oh, I see what you mean.
The Witness: You come right out around here.

Q. For the purpose of the record, will you state, looking at the soundings on Exhibit 5, what is the best course indicated by those soundings at the time they were made, for a vessel to make its way in and out of the harbor. Don't point at the map, because that won't give you a record. Say it in words.
A. I should say that a vessel should steer due east from the mouth of the river.

Examined by Mr. Beach:

—. From your observation during the years in which you have been engaged in the work down there, what can you say about the average rise and fall of the level of the lake water?

A. The difference in feet between the extreme height of the lake and extreme low water is about 5½ feet.

[fol. 342] Q. How does that vary in a general way?

A. We have usually a period of seven or eight years before you get extreme high water. The gauge of the lake is located in Oswego. It is 244.5 feet over mean tide at New York. The water in the lake today is nine tenths over what is called zero in the lake. Extreme high water is 4½ feet over that. Low water has been one foot below it, extreme low water.

Q. And generally speaking it is over a period of years, approximately seven or eight years, that this extreme variation occurs?

A. Yes sir.

Mr. Sutherland:

Q. Have you known anything about the erection of fences to stop the drifting of the sand, like snow fences along a railroad?

A. Yes sir.

Q. How long have you observed that?

A. When I first went to Sodus Point, that beach west of the pier is all sand. There were two fences built there by the United States engineers. They were there when I went there, to prevent that sand from drifting, into the channel. It was found that in high winds it blew over there like snow. Those fences were afterwards replaced by a lot of willow trees, and you can see mounds of sand in among those trees now, that are probably six or seven feet over the general level of the sand.

Q. Have you seen any similar fences around the mouth of the Charlotte harbor?

A. No sir, I never have.

[fol. 343] Examined by Mr. Oviatt:

— If I understand your testimony, Captain, the high water mark of Lake Ontario is about five and a half feet above the low water mark?

A. Yes. That is, the engineering mark for low water is zero. But lower than that, we call it "extreme low." That only has happened in five or six years. In 1906 they had extreme low water.

Mr. Beach:

Q. That high water occurs in wet seasons to some extent?

A. No, not necessarily. It usually occurs in periods. Nobody can predict when it is coming.

Q. There is no tide fall in the lake?

A. No, there is sometimes what we call sieche, due to barometric pressure, but we have no tides.

Q. There is no period of ebb and flow?
A. No, sir.

Mr. Oviatt:

Q. But there is this periodic fluctuation you speak of, of about five and a half feet?
A. Yes, sir. Those are from the levels taken in Oswego.
Q. And your reference is based upon actual Government observations?
A. Yes sir.

[fol. 344] JOHN J. PETTEN, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Examined by Mr. Sutherland:

Q. Where do you reside, Captain Petten?
A. Formerly Charlotte, 23rd Ward.
—. You reside in what we call Charlotte, the Village of Charlotte?
A. Yes, sir.
Q. In the 23rd ward of the city of Rochester?
A. Yes.
Q. How long have you lived there?
A. I have lived in Charlotte since 1851.
Q. How old were you when you went to Charlotte to live, in 1851?
A. I don't know, about twenty, I guess.
Q. What is your present age, Captain?
A. Ninety-one in a few days of five months. The last day of this month I will be ninety-one years and five months.
Q. Since you went there to reside, you have spent your time principally in Charlotte?
A. Mostly winters.
Q. What has been your occupation?
A. Sailing.
Q. You are a sailor upon the lake?
A. Yes.
Q. In charge of a vessel?
A. Sometimes.
Q. Where did you sail, in the course of your life?
A. Through the lakes.
Q. You have been familiar with the conditions, at least I suppose at the mouth of the Genesee river, from 1851 down to the present time?
A. Yes sir.
Q. I want to ask you to describe to the court, according to the best of your recollection, the land on the shore of the lake west of [fol. 345] the Government pier. Tell the Court what it was when you first saw it, in 1851.
A. Why, it was all a beach there, all washed in from the lake.

Q. Sand, was it?
A. Sand, yes.
Q. What was its color?
A. It was the color of sand.
Q. White, Grayish white?
A. Grayish white.
Q. A similar color to what the shore is now?
A. Yes.
Q. Did you use to go down on to that beach?
A. I used to get out winter's wood down there.
Q. Tell the Court how that was?
A. I used to go down there, and there was always a lot of logs there on the beach, and we used to chop up our winter's wood. There was no coal then.
Q. That was before there was any railroad down there?
A. Yes sir.
Q. Did you observe where those logs came from?
A. Well, they drifted down the river, I think, and then worked back on to the beach.
Q. Those logs drifted down the Genesee River, out into the lake beyond the pier, and then set back west of the pier?
A. Yes sir.
Q. Into the angle between the pier and the dry land?
A. Yes sir.
Q. And you went down there and found this wood on the beach and used to cut it up and get your winter's supply of wood from [fol. 346] that source?
A. Yes sir.
Q. Did you notice whether or not there was embedded or covered by the sand any of that drifted wood?
A. Yes sir, lots of it.
Q. Did the sand cover some of that drift?
A. Yes sir.
Q. So that it remained there?
A. Yes sir.
Q. How did you get down to that beach; what was your way of getting there?
A. Go right down the Boulevard.
Q. Go right down Lake Avenue?
A. Yes sir.
Q. And then did you go on dry land or east to the pier?
A. Yes sir.
Q. And that was the condition in 1851, was it?
A. Yes.
Q. So that you went down Lake Avenue, and then turned to the right and went all the way on dry land to the pier?
A. Yes sir.
Q. Could you also turn to the left and go toward the west on dry land, to the west of Lake Avenue or Broadway?
A. Well now, a little ways, yes.
Q. How far?

A. Oh, I couldn't just tell you.

Q. But some distance, as you recall?

A. Yes.

Q. Captain, do you remember a building at one time occupied by a man named McIntyre?

A. Yes sir.

Q. Where was that located?

A. Just west of the pier a little ways.

Q. That was on dry land, was it?

A. It was on this made beach.

[fol. 347] Q. Made by this drifting in of sand that you have described?

A. Yes.

Q How much dry land was there when you first saw the McIntyre place, between the McIntyre house and the water of the lake to the north or northeast?

A. Probably the length of this building.

Q. The length of this court house?

A. This room, I mean.

Q. Would you say seventy-five or eighty feet.

A. Yes, about, 75 or 80, or 100 feet.

Q. Was this dry land as wide as that all the way out to Lake Avenue?

A. It made out farther at the pier, and then began to narrow off.

Q. It extended farther into the lake at the edge of the pier than it did toward the west?

A. Yes sir.

Q. On the south side of McIntyre's house, how much dry land was there before you came to that swamp that was in the interior?

A. I never noticed any swamp in there.

Q. Wasn't there a swale, or wet place, south of the McIntyre house?

A. It was kind of wet when you came down from the village, you know.

Q. Now tell the Court where that water came from that was in that low marshy wet place?

A I think it came from down back of the Boulevard there. There is a regular stream that comes down there.

[fol. 348] Q. West of the Village of Charlotte, there is a hollow?

A. Yes.

Q. And down that hollow running from south to north was a natural stream?

A. Yes.

Q. Drainage water, or spring water, or something like that?

A. Yes sir.

Q. And did that stream, as you recall it, make its way into the low wet place south of McIntyre's?

A. I should say it did.

Mr. Oviatt: I object to this as leading.

Q. Describe to the Court the way of that stream in coming down through the gully west of Charlotte, where it went to, as you recall it?
A. McIntyre dug a ditch through and let it run into the river.
Q. And it ran into the river?
A. Yes sir.
Q. Where did McIntyre dig that ditch?
A. I should say it was about in the center of that flat land.
Q. How far was that ditch, as McIntyre dug it, north of what is now Beach Avenue?
A. I couldn't say just how far it was.
Q. Well, how far south of where McIntyre's house stood was this ditch dug?
A. It was about half way from the lake to the main land.
Q. When did he dig that ditch?
A. I couldn't tell you that.
Q. How long had you been around Charlotte before you saw McIntyre dig that ditch?
A. Oh, I had been around Charlotte two or three years.
[fol. 349] Q. Were you there before McIntyre went into possession of that land?
A. Yes sir.
Q. Who was in possession of it when you went to Charlotte?
A. Zack Nelson.
Q. What did Nelson have on that property?
A. He built the little house that McIntyre had.
Q. You were there when Nelson built it, were you?
A. Yes.
Q. How much of a house was it?
A. It was about 16 by 20, I should say.
Q. Do you know what was under it? Piles or masonry?
A. No, there was nothing. It was built right on the sand.
Q. Do you remember the trees that were growing down there by that McIntyre place that Nelson built?
A. Yes.
Q. What size were they when you first went to Charlotte?
A. McIntyre set them out there, little trees.
Q. Were there any trees growing on this sand when you went to Charlotte?
A. No sir.
Q. McIntyre set out the willow trees?
A. He dug this ditch and set out a lot of trees along the bank of the ditch.
Q. Those are the trees that you say he set out?
A. Yes, he set out all the trees that are there. I guess some of them are there yet.
Q. Were you a member of the Village Board of Trustees of Charlotte?
A. Yes.

Q. Do you remember when Beach Avenue was changed from its original location?

A. Yes.

Q. Where did Beach Avenue originally lay?

[fol. 350] A. Well, it was north of where it is now, some. I don't know how much, but it was right in line with the old Hotel Ontario. The Hotel Ontario was built right on the old road.

Q. The present Hotel Ontario is built on what used to be Beach Avenue?

A. Yes sir.

Q. Was that Beach Avenue worked by the Village as one of the old village streets?

A. Yes.

Q. For how many years was that worked as a village street there?

A. I couldn't tell you how many years. I was on the Board at the time we changed the streets.

Q. And by action of the Village Board, that street, as a public street, was discontinued, the old Beach Avenue, and the new Beach Avenue laid out?

A. Yes sir.

Q. Where it is now?

A. Yes sir.

Q. Now, the old Beach Avenue led to the Spencer House, did it not?

A. Yes sir.

Q. When was that built, do you remember?

A. I don't remember.

Q. What became of McIntyre's old place?

A. Why, I don't remember.

Q. Was it burned down, or was it torn down?

A. Torn down.

Q. Who built the Spencer House?

A. John Burns.

Q. How long did the Spencer House exist as a Hotel?

A. Now, I can't just tell you that.

Q. How long a period of years?

A. Not a great many.

[fol. 351] Q. What became of that?

A. It burned down.

Q. Do you remember when?

A. I remember it was burned down, but I don't remember when it was.

Q. What foundations were under the Spencer House?

A. Posts.

Q. No masonry?

A. No sir.

Q. There were posts?

A. Yes sir.

Q. Driven into the sand, were they?

A. Dug into the sand and posts set.

Q. Captain Petten, will you tell the Court whether or not from

1851 down to the present time you have observed the beach, the shore line?

A. Yes sir.

Q. Is it making any change?

A. Why, it makes out.

Q. Makes out?

A. You put an extension on the pier and the beach makes out.

Q. You have seen that yourself, have you?

A. Yes sir.

Q. From year to year during all this time?

A. Yes sir.

Q. Is it more some years than other years, or is it regular?

A. I couldn't tell you that.

Q. But as the years come and go, you have observed a gradual growth to the north of the dry land?

A. Yes sir.

Q. Captain, you used the expression "main land" at one time in your testimony, just what did you mean by that?

A. Why, high land.

Q. What high land?

A. The old land, where the lake originally came to.

Q. That is what you supposed?

A. That is what I supposed.

[fol. 352] Q. And as you go south from the territory we have been talking about, you come to a place where the land arises perceptibly?

A. Yes sir.

Q. And the soil is not sandy, but it is loam or clay?

A. Yes sir.

Q. And that is what you meant by the expression, "main land?"

A. Yes sir.

Q. How many times have you seen those big piers extended out there?

A. Oh, three or four times.

Q. You remember, don't you, that there was a time when there was rock taken down there to fill in the piers?

A. There was rock taken down there, as I supposed, to build a stone pier, instead of wooden.

Q. Was that stone actually used in the pier?

A. No.

Q. When was it taken away?

A. Well now, I can't just tell about that.

Q. You remember the fact that it was drawn away?

A. Yes, it was drawn up here and put into the Main Street bridge. They built the Main Street bridge with it.

Q. The bridge over the railroad?

A. No, the bridge over the river, the Main Street bridge over the Genesse River.

Q. With that stone?

A. Yes sir.

Q. In the city of Rochester?

A. Yes sir.

Q. The Main Street bridge, right here in the city?
A. Yes sir.
[fol. 353] Q. About when was that stone drawn away?
A. I don't just remember the dates. I never kept track of it.

The Master: What is the purpose of this, Judge Sutherland?
Mr. Sutherland: We will show, Your Honor, an opinion of Caleb Cushing, one of the Attorney Generals of the United States, to the effect that the United States Government should compensate the owner of the land on which this stone was laid; and we will show you where it lay, and all about it, on this very land that is in dispute now. We have the United States Attorney General's opinion on that very subject; and he discusses who that land belongs to. He says it belongs to the claimant, who wanted rent for the use of the land on which this stone lay. That is why I am bringing this out.
The Master: Of course, that is absolutely unknown to me, and I could not see any reason for it at all.

Q. Where did that stone come from, do you know?
A. I couldn't tell you. I think it must have come down from Chaumont.
Q. Brought down in boats?
A. Yes sir.
Q. And you actually saw it drawn away?
A. Yes sir.
Q. And you know that it was put into that bridge?
A. Yes sir.

[fol. 354] Cross-examination.

By Mr. Oviatt:

Q. Where was the shore line, or the water line in 1851, Mr. Petten?
A. Well, I couldn't tell you where it was.
Q. Do you recall about where it was, with reference to Beach Avenue?
A. It was some eight or ten rods from where it is now.
Q. Eight or ten rods from where it is now?
A. Yes, I should think so.
Q. You mentioned the fact that you knew McIntyre and Nelson?
A. Yes sir.
Q. And do you know from whom Nelson bought his property?
A. No sir.
Q. You know whether he bought it or not?
A. I do not.
Q. Don't know whether he was a squatter or not?

Mr. Poole: I object to that as calling for a conclusion of the witness.
The Witness: I can't tell whether he was a squatter, or not.

Q. Do you know what the opinion of the village was as to whether or not he was a squatter?

Mr. Poole: I object to that.

The Master: That is the same as we had yesterday, I am going to let that in.

Mr. Poole: I object to it on the ground that it is hearsay, and take an exception.

[fol. 355] Q. Do you know what the village people used to say about it?

A. No sir.

Q. Have you told people in the court room this morning that you knew that Nelson was a squatter?

A. I don't know whether he was a squatter or not. Somebody spoke to me here.

Q. Didn't you tell him that you wanted to take the stand and testify that Nelson was a squatter?

A. No sir.

Q. Did you tell him Nelson was a squatter?

A. No sir.

Q. Said nothing on that subject at all?

A. He asked me if Nelson was a squatter, and I told him I didn't know.

Q. You told him you didn't know?

A. I think so.

Q. You don't remember any swamp down there at all?

A. No sir.

Q. No swamp anywhere near Beach Avenue?

A. No sir.

Q. At no time while you were there?

A. No sir.

Q. Is your recollection on that clear?

A. Well, there might be. I don't know of any.

Q. You were there every year from 1851?

A. Yes sir.

Q. Till the present time?

A. Yes. I worked down there part of the time. 1854, I worked down there. There was a brick yard down there, and I worked in the brick yard.

Q. And you don't remember any swamp at all?

A. No.

Q. You said that McIntyre dug a ditch so as to take the creek out to the river?

A. Yes sir.

Q. Where did the creek run before he dug the ditch?

Q. There was no creek.

[fol. 356] Q. There was no creek?

A. No.

Q. So that McIntyre dug a ditch and created water there in the ditch?

A. I never noticed it. I suppose that it did drain the village there. It may be a little wet in some places. The water would overflow sometimes. I have been on Beach Avenue there when the water would be up to your ankles.

Q. The water would be up to your ankles on Beach Avenue?

A. Yes.

Q. All the way from the lake to Beach Avenue?

A. All over down there.

Q. When did you notice the water as deep as your ankles from the lake way to Beach Avenue?

A. There was one winter down there. I can't just remember what winter it was.

Q. Do you know about when it was that water was up to your ankles all the way from Beach Avenue to the lake?

A. Over forty years ago.

Q. That would be about 1880?

A. Maybe so.

Q. How many times have you noticed the water as deep as that?

A. I don't know as I ever noticed it but once. I was down there one evening, and it was all ice and water, all over Beach Avenue, and the Boulevard, too.

Q. Did the water and ice come as far south as what you call the main land, or the high land?

A. It was right along there. It was all over.

Q. How long did the water stay there at that level?

[fol. 357] A. Oh, I couldn't tell you.

Q. For some time?

A. Yes. Now they got that ditch dug now that takes it off down to the river.

Q. And McIntyre dug that ditch so as to take the waters away when they rose up in that way from the lake?

A. I suppose—It didn't come from the lake. That water came from the land.

Q. And it extended over the land, all the way to the lake?

A. Yes.

Q. Where did it come from?

A. There was a regular water way down back of Beach Avenue there, back of the Boulevard.

Q. West of the Boulevard?

A. Yes.

Q. That waterway went where before the digging of the ditch?

A. It went down through and flowed all over everything.

Q. Did it flow into the lake?

A. Yes, if there was water enough.

Q. So that before McIntyre dug his ditch the waterway west of the village ran down into the lake?

Mr. Poole: That is not a fair question. That is not what he said at all.

The Master: I think that question is proper.

Mr. Poole: Exception.

Q. So that before McIntyre dug his ditch this waterway west of Beach Avenue run down into the lake?

A. Yes, it ran down to the lake.

[fol. 358] Q. And then McIntyre dug his ditch so as to take it south of his place into the river?

A. I suppose so, I don't remember. He dig a ditch there for some purpose. I don't know what for.

Q. You noticed that the beach of the lake in 1851 went back from the lake to what you called the high land, is that true?

A. No sir.

Q. That wasn't true?

A. No sir, it didn't go clear to the high land.

Q. How far back did it go?

A. It is made out about seven or eight or nine rods. The rest was filled in before I knew anything about it.

Q. How do you know the rest had been filled in?

A. I supposed it had.

Q. And this part that had been filled in before you knew anything about it, was sand?

A. Yes sir.

Q. So that the sand, when you first became acquainted down there, ran from the water's edge back to where the high land was?

A. Yes sir.

Q. And that was all sand?

A. All sand, yes sir.

Q. And you called that the beach, did you?

A. Yes.

Q. So that when you went down there the beach of the lake went from the water to the high land, and was all sand?

A. The beach of the lake?

Q. Yes, the sand beach of the lake?

A. The beach was right at the edge of the lake.

Q. What was the difference between the sand at the edge of the [fol. 359] lake and the sand as it went back to the high land?

A. I couldn't tell you.

Q. Was there any difference?

A. I don't know as there was.

Q. Do you remember when Main Street bridge was built?

A. I remember when it was built, yes.

Q. Do you remember about what year it was?

A. No, I couldn't tell you just what year it was.

Q. South of McIntyre's shanty was an open body of water large enough for boats to enter, was there not?

A. South of his shanty?

Q. Yes.

A. No sir.

Q. There was not?

A. No sir.

Q. Do you remember that boats from the river went into a body of water or harbor south of McIntyre's island?

A. There was a little place there.

Mr. Sutherland: I object to the use of the term "McIntyre's Island."

Mr. Oviatt: I beg your pardon.

The Witness: I can explain that. Between the lake and the pier there was one open tract there, and it was bridged over, and inside of that was a little place where he used to keep his boat.

Q. How large a body was that?

A. It must be as big as around here (indicating).

Q. Twenty feet square.

A. I don't know as it was more than twenty feet one way. It [fol. 360] might be a little bit more the other way.

Q. And there was an opening from the pier into that body of water?

A. Yes sir.

Q. And that was south of McIntyre's shanty?

A. Yes sir.

Q. And was it into that body of water that the ditch ran?

A. I couldn't tell you.

Q. You don't remember where the eastern end of the ditch was?

A. No, I couldn't tell you.

Q. Do you remember that when the furnace was built there they filled in some land?

A. Yes sir.

Q. Where did the furnace fill in the land?

A. Pretty near from the furnace down to the river.

Q. How far north of the furnace did they fill it in?

A. North of the furnace?

Q. Yes.

A. It was east of the furnace that they filled in.

Q. They filled in no land north of the furnace?

A. Not that I know of.

Q. Is your recollection clear as to the fact that the Spencer House was built on piles?

A. I can't say the Spencer house was.

Q. Do you remember what it was built on?

A. No.

Q. You don't remember that?

A. No, there was no walls there.

Q. No masonry?

A. No.

Q. Is your recollection clear that the Spencer House did not have [fol. 361] a stone or masonry wall under it?

A. Yes sir.

Q. Quite clear?

A. Quite clear.

Q. In thinking back as to the foundation of the Spencer House, you would say that you remember very clearly?

A. Why no, not the Spencer House.

Q. As to there being no stone wall under it?

A. I don't remember it.

Q. Did you see it being built?
A. Yes sir.
Q. Do you remember whether there were piles under the McIntyre shanty?
A. There was not.
Q. There was not?
A. It was built right on the sand.

Examined by Mr. Sutherland:

—. I show you a photograph, and ask you if that is a picture of the Spencer House?
A. Well, now, I can't say whether it is or not.
Q. Just look at it.
A. It doesn't look familiar to me. It don't look like the Spencer House to me.

(Photograph last above referred to marked Defendants' Exhibit 7.)

Examined by Mr. Oviatt:

Q. You had something to do with the laying out of the new Beach Avenue, as a village trustee?
A. No, I think they laid out the street.
Q. I thought you said you were one of the village trustees when the location of that street was changed?
A. Yes.
[fol. 362] Q. Do you recall that they filled in, in order to make the new Beach Avenue of the village?
A. No, I couldn't say. They were to make a new road, in good shape and everything.

William C. Gray, a witness called on behalf of the defendants, being first duly sworn and examined by Mr. Beach, testified as follows:

Q. Mr. Gray, you live in the city of Rochester?
A. Yes sir.
Q. What is your age?
A. 72, past.
Q. What is your occupation?
A. Surveyor, civil engineer.
Q. How many years have you been engaged in that occupation?
A. Why, steadily, fifty years, and about three years more.
Q. Were you engaged in that occupation in about the year 1874?
A. Yes sir.
Q. And were you at or about that time employed by the New York Central Railroad Company?
A. Yes sir.
Q. In that capacity?
A. Yes sir.

Q. Did you do some work for the New York Central in what was then the village of Charlotte and in the section which has been discussed in this proceeding?

A. Yes sir.

Q. Who were you working with at that time?

A. Daniel McCool, resident engineer.

[fol. 363] Q. He was an employee of the New York Central?

A. Yes.

Q. In what capacity?

A. Resident engineer.

Q. Will you tell us what work you did, the first work you did for the New York Central, in connection with Mr. McCool at Charlotte, in the neighborhood of what is now known as Beach Avenue, and what year it was?

A. In 1873 we produced or extended the line of the Charlotte Branch north from the station down to the beach.

Q. The Charlotte Branch of the New York Central?

A. Yes sir.

Q. Where did that terminate?

A. It terminated at the water of Lake Ontario.

Q. That was a single track?

A. Yes sir.

Q. With reference to the present Beach Avenue, where was that single track? Did it cross it?

A. It crossed Beach Avenue, yes sir.

Q. Did you help make the survey to lay that track?

A. Yes sir.

Q. At that time was there any building on what we are calling Lot No. 21?

A. The Spencer House, and some stables, and a small eating pavillion.

Q. Do you recall when the Spencer House was built?

A. 1873.

Q. Now this track, as it was projected, you have stated was a single track first?

A. Yes sir.

Q. Thereafter, generally speaking, what change was made with reference to the track around in Lot 21?

[fol. 364] A. Well, in 1884 the Ontario Beach Improvement Company took over that property, and at that time there was a balloon track put in so that the cars running across from the city could go around without backing up, the engine backing up.

Q. In other words, when the single track was there, the trains operated straight down to the lake and then backed up to get out?

A. Yes sir.

Q. Now in laying that track, the single track first, what did you do with reference to the ground, as you found it there?

A. Running north from the R. W. & O., we ran into a swamp, a large swamp; and that ran down to within a few hundred feet of the present Beach Avenue; and that we filled with ties, and slag and earth.

Q. Now, what do you mean by the R. W. & O.?
A. The R. W. & O. branch of the railroad, which crosses the river south of this Ontario Beach Park.
Q. Approximately how far?
A. I should say about seven or eight hundred feet, maybe a thousand.
Q. That was somewhere in the neighborhood of the old Light House, so called?
A. Yes, a little northeast of that.
Q. What is the full name of the R. W. & O.?
A. Rome, Watertown & Ogdensburg.
Q. The Rome, Watertown and Ogdensburg Railroad Company?
A. Yes sir.
Q. Starting from that point, there was, as I understand you, dry land and then you reached a swamp?
A. Yes sir.
[fol. 365] Q. And that you filled in for this single track?
A. Yes.
Q. Down pretty close to the present Beach Avenue?
A. Yes.
Q. How far would you say the R. W. & O. railroad tracks were from the present Beach Avenue?
A. I should say seven or eight hundred feet, or a thousand feet. That is a guess, of course, I haven't measured it.
Q. Now this swamp was located where, with reference to the present Beach Avenue which you crossed?
A. South of it.
Q. About how far south was the body of that swamp?
A. Why my recollection would say three hundred feet.
Q. Well now from that point, describe as you went along what was the condition of the ground, or the foundation where you laid that single track?
A. Why, the first half of that three hundred feet was kind of marshy, and after that we came into sand, and sand all the way to the lake.
Q. Now as you got to Beach Avenue and from there north, what did you do with reference to laying that track, the single track?
A. We graded it. Some places we made a cut, and other places we made some slight fill.
Q. What was the condition of that section, Lot 21, generally speaking, at that time? North of Beach Avenue?
A. Simply a wild piece of land, so far as the surface was concerned, it was wild land.
Q. Was it rough, or smooth, or how?
A. Rough.
Q. Hummocks?
A. Yes, ridges.
Q. For the foundation north of Beach Avenue, did you make any fills out in there?
A. Yes, in some of the holes between the ridges, we made some [fol. 366] slight fills.

Q. Was there some marshy or wet land in there?

A. No marsh land, but wet, as the water percolated through from the lake.

Q. What did you do where those wet places were?

A. Put in ties, old ties, and then filled them over with other material.

Q. How deep down did you go with those ties?

A. Just to the water. Sunk them in the water.

Q. Could you say from recollection about how far below the surface?

A. Why it varied. Some places it wasn't more than six inches. Some places three feet.

Q. As you progressed north of Beach Avenue with that single track, describe what you found there and what you did with reference to laying that track?

A. We just filled in the hollows and cut off the ridges, so as to get a straight grade.

Q. How long did that single track continue to exist?

A. That was taken up after we built the balloon track in 1884. We used that for the material for the balloon track.

Q. Did you help make the survey for that balloon track?

A. Yes sir.

Q. Did you help lay that balloon track?

A. No sir.

Q. Did you have anything to do with laying it, so far as watching the progress of it was concerned?

A. Well, yes, I did, in a general way.

[fol. 367] Q. You were there or thereabouts, or had something to do with the laying of the track?

A. Yes.

Q. Were you working under Mr. McCool in 1884?

A. No, I was working under Mr. Fisher.

Q. But still in the employ of the New York Central.

A. Special.

Q. Specially for this work?

A. Yes.

Q. I show you a tracing. Did you make that tracing?

A. Yes sir.

Q. Is that the balloon track which you have described shown upon that tracing?

A. Yes sir.

Q. Was that laid out according to the survey as it was at that time?

A. Yes sir.

Q. And as the track was laid?

A. Yes sir.

Q. That balloon track is indicated in yellow, by a single line?

A. Yes sir.

Q. That shows the Beach Avenue, to which you have referred?

A. Yes sir.

Q. It also shows what is labelled "Old location of Beach Avenue abandoned March, 1884?"

A. Yes sir.

Q. While we are on that, will you please tell us about old Beach Avenue, and what you know about the re-location of Beach Avenue?

A. Old Beach Avenue was a road leading from opposite a cottage on Beach Avenue east to the Spencer House.

Q. The Spencer House is also shown on there?

A. Yes.

[fol. 368] Q. And that was changed to the present location later?

A. Yes.

Q. Did you have something to do with the making of that change?

A. Yes.

Q. What did you do?

A. I made the map, to be submitted to the Board of Trustees of the Village of Charlotte.

Q. And then the new Beach Avenue was laid out as it is now located?

A. Yes, pretty near.

Q. Did you help make the survey for the New Beach Avenue?

A. Yes, I made it.

Q. You made the survey for Beach Avenue?

A. Yes.

Q. There is shown upon this map a number of dots, surrounded by blue or green patch lines. What do those indicate?

A. They represent the location of willow trees, as now exist.

Q. As now exist?

A. Yes.

Q. From actual survey?

A. Yes sir.

Q. There is indicated a parallel Yellow line running east and west just north or nearly parallel with the present Beach Avenue. What does that represent?

A. That represents the old location of what they call the old McIntyre ditch.

Q. What did you do with reference to that ditch?

A. I covered it over with ties, first, built a cob house with ties, and then we decided that wouldn't do, and we put in two strings of 36-inch tile.

Q. Extending from where to where?

A. From south of Beach Avenue west to Lake Avenue and through to the river.

[fol. 369] Q. You have indicated on here little oblong marks with numbers on them; what do they indicate?

A. They indicate the test pits, or part of the test pits, that were dug by Mr. Ferguson lately and which were taken by the City engineers and myself, the location of which were taken by the City engineers and myself.

Q. From the survey?

A. From the survey, yes.

Q. Now, at the time that you located and laid the balloon track what did you do with reference to a foundation for that track?

A. Wherever it was low we excavated down to the water and filled in with ties, placing ties radially with the curve.

Q. What else, if anything, did you put there in connection with the ties?

A. Then on top of that we brought heavier material than the sand from up the road aways and then put our ballast and ties on and the rails on top of that.

Q. Is it necessary to have a firm foundation for a loop track?

A. It is for any track.

Q. With a loop track is it any different?

A. It is much more necessary to have it on a curve track than straight track.

Q. Now, on this map there seems to be indicated one of those oblong marks No. 20: do you recall that one?

A. Yes sir.

Q. That is shown exactly on that balloon track?

A. Yes sir.

[fol. 370] Q. You observed that test pit?

A. Yes sir.

Q. And saw the ties which you put in at that time?

A. Yes sir, and, by the way, the reason those ties were put in was the fact that if we put in any heavier material on top of the sand without something to stop it it would go right down through, and even slag and stuff that was put in at that time cannot be discovered now. It has disappeared.

Q. How far below the surface were those ties laid for the balloon tracks at different points?

A. I should say about two feet.

Q. Did they vary according to the spot where they were put?

A. Oh yes.

Q. Now, were there ties put at many places around under the balloon track?

A. Great many places.

Q. What was the general nature of that soil with reference to whether it was dry or otherwise, starting at Beach Avenue and running northerly at that time?

A. It as all sand.

Q. Were there any marshy spots at that point then?

A. Not marshy spots, there were wet places between the ridges where the land was down lower than the tops of the ridges and where the water would filter through from the water of the lake.

Q. Now, do you know what this so-called McIntyre ditch led to or what it was constructed for, what purpose?

A. To take the water from the creek which comes from the southwest of Lake Avenue and spread over the property without [fol. 371] any outlet and Mr. McIntyre opened that up to carry the water into the river.

Q. Has there ever been a time that you have noted when the water from that creek could not be carried in those tiles?

A. Yes sir. In 1915 we built the new improvement of Beach Avenue west of Lake Avenue and in the spring of 1916 the water

came down there with such a rush, down through that creek, that it overflowed the street, so much so that they had to put duck boards on the north side so that the people could go back and forth.

Q. When you speak of the street what do you mean?

A. Beach Avenue.

Q. How about Lake Avenue?

A. Lake Avenue the same way.

Q. That water spread over what territory?

A. Territory of 200 feet.

Q. Going towards the river from Lake Avenue lying north of Beach Avenue did it spread in that direction at all?

A. No, it did not; it ran over across.

Q. Which way?

A. I do not mean it ran over across, it ran back on the property west of Lake Avenue.

Q. What did that carry down with it, that stream?

A. It was just the color of chocolate and when it receded it left the whole street painted with mud.

Q. Was that a spring flood?

A. Yes sir.

Q. Now, along the north of Beach Avenue what can you say about the trees or growth there in 1874 when you were there?

A. There were trees scattered all over the place, a great many more than there are now.

[fol. 372] Q. You say they are indicated on here as you found them when you made the survey recently?

A. Yes sir.

Q. Were those trees there in 1874?

A. I assume they were.

Q. Have you noticed the size of them?

A. Yes sir.

Q. There has been testimony here that Mr. McIntyre planted some willow trees along his so-called ditch; what kind of trees were those you mostly found?

A. I have only indicated willow trees.

Q. How large were those willow trees?

A. When?

Q. When you saw them recently.

A. They ran from 7½ feet in circumference up to 13 feet.

Q. Do you know whether there was one of those willow trees cut?

A. Yes sir.

Q. How far was that from this so-called ditch?

A. About 15 feet.

Q. When was it cut? Do you know when it was cut?

A. Yes.

Q. Recently, was it?

A. Yes.

Q. This summer?

A. I think I can give you the date if you want to know.

Q. All right.

A. August 15, 1923.
Q. Cut this summer then?
A. Yes sir, this summer.
Q. Did you count the rings on that tree?
A. Yes sir.
Q. How many were there?
A. 73.
Q. You have indicated upon the map two trees northerly and easterly of the balloon track as shown?
A. Yes sir.
Q. Were those willow trees?
A. Yes sir.
Q. Have you taken measurements of those two willow trees also?
A. Yes sir.
[fol. 373] Q. How did they compare with the willow trees along the ditch and specifically with the tree which was cut?
A. About the same size.
Q. Those trees are standing and we saw them the other day when we were down there?
A. Yes sir?
Q. Those two trees you have just spoken of are the ones indicated on the map close to test pit No. 15?
A. Yes sir.
Q. You have shown upon the map also a yellow line near what you have designated the Genesee River?
A. Yes sir.
Q. That yellow line shows an indication just south of the Spencer House: tell us about that?
A. Those yellow lines were made from the survey of McCool in 1873, map 1874, and show a basin there of about 240 feet wide by 80 feet on the south end and 125 feet on the north end.
Q. You say survey made by McCool: that was the one which you have stated you assisted in making?
A. Yes sir.
Q. That pool or basin in there was formed how?
A. By a breakage in the breakwater along the shore.
Q. Of what?
A. Of the Genesee River.
Q. You have not indicated the breakwater along there on this map?
A. No sir.
Q. That breakwater was the one erected by the government?
A. Yes sir.
Q. And there was a breakage there which let the water into this hollow?
A. Yes sir.
Q. You knew about the Spencer House being demolished?
A. It burned down.
[fol. 374] Q. About 1920?
A. I don't exactly recall when it burned down, the year it burned down. It was opened in 1873.

Q. It was there in 1884 when you laid the balloon track?
A. Yes sir.
Q. At that time when the balloon track was laid there were the buildings which are now on the premises known as the Ontario Beach Park premises?
A. The Spencer House was not there when we laid the balloon track, when they laid the straight track.

By the Master:

Q. What you meant by your prior answer was that it was there in 1873 or 1874?
A. Yes sir.
Q. It must have been destroyed at some time between 1874 and 1884?
A. I think it was about 1879.

By Mr. Beach:

Q. At the time this balloon track was laid the buildings known as the Ontario Beach Park buildings, the Ontario Hotel and so on, were they in existence?
A. They were built that year.
Q. 1884?
A. 1884.
Q. You have shown upon this map also certain lines at the northerly side at Lake Ontario, three in number, colored black, yellow and green?
A. Yes sir.
Q. Will you tell us what those are?
A. The yellow was the water line of the lake as shown on McCool's survey in 1874, shown on his map in 1874.
Q. That is where it was at the time you helped make the survey?
[fol. 375] A. Yes sir. The black line was the line made by Gray and Storey, made by myself in fact, in March 1884, and the green line is the City Engineer's location of 1919.
Q. Now going back to the first one you have spoken about, namely, the McCool shore line, that is referring to a certain base elevation of the lake?
A. As being 3.18 above zero.
Q. What was zero?
A. Zero was fixed by the government, from which we take all government readings. The government instead of carrying out six figures for taking the actual readings has fixed a zero chart and then we put the ground so much above or below zero.
Q. Where is that located physically in this neighborhood?
A. There was a gauge—I haven't seen it this year or for the last two or three years—there was a gauge at the north end of the west abutment of the Rome, Watertown and Ogdensburg Railroad bridge.

Q. In other words you took it from an actual physical examination of this so-called zero mark established by the government?

A. Yes sir.

Q. And the next line you spoke about?

A. Gray and Storey was 3.44 above zero.

The Master: That is the black?

The Witness: That is the black.

Q. And the next one, the City Engineer's location in green?

A. 3.14.

Q. Now, in feet what is the difference between 3.14 and 3.18?

[fol. 376] A. Just one-half inch or four one-hundredths of a foot.

Q. In other word, these numbers or figures, 3.14 and 3.18, represent feet?

A. Yes sir.

Q. Above the zero mark?

A Yes sir.

Q. So that the 1884 line marked as 3.44 is thirty one-hundredths of a foot above the City Engineer's line as located in 1919 and marked 3.14 elevation?

A. Yes sir.

Q. At present the pool which you have mentioned south of the Spencer House as located upon this map does not exist?

A. No.

Q. And the pier has been erected along the line of the river from a point north to a point south of that location?

A. Yes sir, concrete pier.

Q. You have also indicated upon this map two lines, one in black which is noted in parenthesis "Shepard" and one in blue or green marked "Finley?"

A. Yes sir.

Q. What were those?

A. Those were plotted from the notes of William Shepard and Finley—I have forgotten his first name—taken from the records in the County Clerk's office.

Q The Greece field notes?

A. Yes sir.

Q. Those differ slightly from these lines as shown upon a map produced by Mr. Vedder, the city engineer?

A. Yes sir.

Q. But at the easterly end there is a divergence between your line and his line of the plotting of about how much?

A. 26.18 feet.

Q. You have shown also in a legend upon this map the area given by the Finley notes and by the Shepard notes as computed by you?

[fol. 377] A. Not Shepard notes, both Finley Finley says 3.69 acres and his figures say 3.29 acres, making forty-one one-hundredths of an acre short.

Q. You haven't added any area of what was known as River Street?

A. No sir.

Q. Have you figured in the area of the sub-sections 1 and 2 of Lot 21?

A. I have not.

Q. That is just the one chuk bounded by Lake Avenue and by the blue line as it extends to the east?

A. Yes sir.

Q. There is shown upon this map a dotted line extending from what is known as Lot No. 22 into Lot No. 21; what does that indicate?

A. That represents the boundary of the swamp as per F. J. M. Cornell's map dated February, 1854.

Q. Who was F. J. M. Cornell?

A. He was one of the old-time surveyors of Rochester and one of the best of the old-time surveyors.

Q. He made many surveys of the territory in this neighborhood?

A. Yes sir.

Q. And this marsh as indiated upon there, can you tell us whether that coincides substantially with the mark you have described and which you say you crossed with a single track in Lot No. 22?

A. Yes sir, it does.

Q. In making your excavation for the test pits near Beach Avenue did you find anything to indicate formerly low ground or marshy condition in that section?

A. In certain places I found some old ties, I found drift, driftwood, planks and various other things that showed there had been something besides sand there.

[fol. 378] Q. Was there anything in the nature of a loamy soil or humus soil there?

A. There was sandy loam at places that looked as if it had been washed in, maybe filled in, can't tell.

Q. But that was in the territory through which the creek ran where the McIntyre ditch was built?

A. Yes sir.

Mr. Beach: I offer this in evidence.

(Received in evidence and marked Defendants' Exhibit 8.)

Mr. Oviatt: I suggest we now note on the record that Defendants' Exhibit 8 is the tracing from which plaintiff's Exhibit 5 for identification was printed.

Mr. Beach: You can put the other one in evidence at any time you see fit as a regular exhibit.

Q. Mr. Gray, I show you a photograph and ask you if you know what that is?

A. That is a photograph of the Spencer House.

Q. Did you see the Spencer House yourself?

A. Many times.

Q. Is that a true representation of the Spencer House as it existed?

A. Yes sir.

Q. Taken from what point?

A. Taken from the south west, opposite the southwest corner looking northeast toward the lake and the river.

Q. You testified when the Spencer House was built?

A. Yes sir.

Q. What was the date?

A. It was opened July 9, 1873, by Captain Burns and Craig.

Mr. Beach: I offer that photograph in evidence.

(Received in evidence and marked Defendants' Exhibit 7.)

[fol. 379] Q. There is a little building shown on this photograph to the left: what was that?

A. That was the McIntyre barn. That was used as a tool house there

Q. Was McIntyre's house there at this time?

A No.

Q. There are indicated some trees on this photograph: do you know what kind of trees those were?

A. Willows.

Q. Were they there at the time the Spencer House was completed—built?

A. Yes sir, and before.

Q. They are of various sizes?

A. Yes sir.

Mr. Sutherland: Before we take a recess may we have a conference for just a moment.

The Master: Certainly.

[fol. 380] Mr. Sutherland: Captain Pettin wishes to make one correction to his testimony. He asked me to let him be recalled for a moment.

The Master: All right.

JOHN J. PETTIN, was thereupon recalled as a witness in behalf of the defendants, examined by Mr. Sutherland, testified as follows:

Q. Captain Pettin, do you wish to make some correction to your testimony as given this morning?

A. Yes, sir.

Q. What do you wish to say?

A. Well, that marsh business, I understood what we were talking about was on the McIntyre property, and I said I didn't know as there was any marsh there; I never seen any. I thought it was on the McIntyre premises they were referring to; but the marsh, I understand now, was in front of the furnace. I know all about that.

Q. Well, what do you want to say; what do you remember about a marsh in the vicinity of the furnace?

A. Why, there was a marsh all through from the McIntyre property clear up to the railroad, all marsh. The furnace has filled it all in with slag.

Q. And when the railroad was put down through there there was a fill made through that marsh, wasn't there?

A. Yes.

Q. Now, this morning when they were asking you about whether you remembered any marsh you say you thought they were talking [fol. 381] about the McIntyre property?

A. Yes.

Q. And you wished to say that you didn't remember any marsh on the McIntyre property?

A. Yes, sir.

Mr. Sutherland: That's all.

Cross-examination (to Mr. Oviatt):

Q. You wish to say now that you don't remember any marsh north of Beach avenue as it is now located; is that right?

A. No, sir.

Q. In other words, you remember no marsh at all to the north of what is now Beach avenue?

A. No, sir.

Q. That's what you mean to say?

A. Yes.

Mr. Oviatt: That's all.

William C. Gray was thereupon recalled for further direct examination and testified as follows:

(To Mr. Beach:)

Q. Mr. Gray, when I was examining you this morning in regard to the single track you indicated or stated that it ran straight north to the water's edge?

A. Yes, sir.

Q. Now, the map which was put in evidence and marked, Defendants' Exhibit 8, does not indicate that single track as it existed prior to the construction of the balloon track?

A. No.

Q. Can you state with reference to some objects upon this Exhibit 8 about where that straight track ran?

A. It was a continuation of this tangent which is shown at the lower part of this map, right straight through.

Q. Now, this tangent shown on the lower part of the map is the [fol. 382] yellow line indicating a track before it commenced to go out around the balloon?

A. Yes, sir.

Q. It was a straight line with that?

A. Yes, sir.

Q. On that map is there anything there which you have shown which would fall about on the line, or on the line of that straight track as it existed?

A. Why, I don't know. I think there is if I could see.

Q. Well, rule it out there and indicate it, if you can.

A. (Witness takes rule and marks a line on the map.)

Q. Now, you have marked upon the map a lead pencil line indicating substantially the location of that single track which you have testified to?

A. Yes, sir.

Q. On that map that passes close to this oblong test pit number 21?

A. Number 12.

Q. Number 12?

A. Yes, sir.

Q. Do you recall at Number 12 whether there were found ties?

A. There were.

Q. That is, the foundations were put in there?

A. I think so. I can tell in a second. (Witness refers to notes.) No, there were not.

Q. Number 12?

A. Wait a minute (again refers to notes). Yes, there were some ties in there.

Q. There were some ties at Number 12?

A. Yes.

Q. Foundation ties?

A. Yes, sir.

Q. I did not ask you about how far, as shown upon this map, and [fol. 383] as was the fact at that time, the balloon track on its northerly boundary was from the edge of the lake at that time?

A. I should say about seventy-five feet.

Q. And what was the nature of the soil or land between that balloon track and the edge of the lake?

A. Sand.

By Mr. Moser:

Q. Mr. Gray, on this map of Charlotte, appearing at page 31 of the Monroe County Atlas of 1872, which was offered in evidence as Defendants' Exhibit 6, will you indicate where on that map Lot 20 is?

A. North of that line, which line is between the name of J. M. Whitney and "Iron Company."

Q. And to the west of the street marked, "Broadway"?

A. Yes.

Q. Is this street that appears on the map running westward from Broadway what is now Beach avenue?

A. Yes, sir.

Q. And is the tract lying north of Beach avenue as appearing on that map, and west of Broadway, the portion of Lot 20 that is in controversy in this litigation?

A. Yes, sir.

Q. This is the Atlas of 1872. You first went down there in 1873?

A. Yes, sir.

Q. Were there any buildings on that property at that time, on Lot 20?

A. Right at the end of old Beach avenue, running east from Broadway, was a cottage called "The Cottage," afterwards the Cottage Hotel.

Q. Afterwards the Cottage Hotel?

A. Yes, sir.

Q. The same cottage was afterwards used as a cottage hotel?

A. Yes; it was built on.

[fol. 384] Q. And that building stood there in 1873 when you first went on it?

A. Yes, sir.

Q. Do you know who occupied it at that time?

A. No, I don't, not at that time. I have forgotten now. I think it was a man by the name of Wall.

Q. Well, do you know who owned the property at that time?

A. J. M. Whitney.

Q. J. M. Whitney owned it?

A. Yes.

Q. And that cottage which stood on Whitney's property was the property that was afterwards enlarged into the Cottage Hotel?

—. ——.

Q. I show you a map, signed, "W. C. Gray," dated June and July, 1920; did you make that map?

A. Yes, sir.

Q. From a survey made by yourself?

A. Yes, sir.

Q. What does that map show?

A. Shows not only the land owned by the Bartholomay Company, at that time the Bartholomay Brewing Company, but also the location of all the buildings and the character of the buildings, that is, whether they are single or double, or two-story, or what.

Q. That is, those were the buildings that were on the property in 1920?

A. Yes, sir.

Mr. Moser: I offer that map in evidence.

Mr. Shepard: May I ask what the purpose of this evidence is?

Mr. Moser: To assist in the defense of the Batholomay Company on this law suit.

[fol. 385] Mr. Shepard: Is it on the question of values here?

The Master: I don't know. What do you say to that, Mr. Moser?

Mr. Moser: Well, I didn't know—I hadn't heard of any question of values here.

Mr. Shepard: Well, I think I will enter an objection to it on behalf of the city, as incompetent, immaterial and irrelevant.

The Master: Note the objection on behalf of the City of Rochester, by Mr. Shepard.

Mr. Shepard: I ask if my inquiries have been put on the record also.

The Master: Yes, they are on the record also. The map will go in.

Mr. Shepard: May I have an exception?
The Master: Note an exception for Mr. Shepard.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 9.")

Q. Now, in this map, on Beach avenue and to the north of Beach avenue this is a plot not included within the green line: what is included in that plot?

A. That's the McIntyre property, the Boshart property, and the Railroad property.

Q. They are all defendants in this law suit?

A. Yes, sir.

Q. And the property of the Bartholomay Company is enclosed within the green line?

A. Yes, sir.

[fol. 386] Q. Across the top of the map is a line with above it four waves: what is indicated by that line?

A. That is the shore of Lake Ontario.

Q. That's where the land and the water met at that time?

A. Yes.

Q. In 1920?

A. Yes, sir.

Q. And you have plotted on this map the low water mark of 1890 and 1897?

A. 1887.

Q. 1887?

A. Yes, sir.

Q. What is this gray line that is shown across the map, leading back to each of the buildings?

A. Sidewalk.

Q. What kind of sidewalk?

A. Cement sidewalks.

Q. Now, Mr. Gray, there is just one other thing that I want to ask you on with reference to the washing up of the sand by the waves. You have been at the lake a great deal?

A. Oh, yes.

Q. And have you observed the piling up of sand by the waves?

A. Yes, sir.

Q. Will you describe what the action is?

A. Why, the action is in the heavy sea the waves wash up in ridges, wash the sand up in ridges, and when the water recedes——

Q. You mean when the waves.

A. What did I say?

Q. You said, "when the water recedes."

A. I mean when the waves recede the wind comes, and if it blows sufficiently strong it dries that sand out and drives it over.

Q. You have seen this action yourself?

A. Very frequently.

Mr. Shepard: May I ask just a question or two about the [fol. 387] map?

(To Mr. Shepard:)

Q. You have indicated what you call the water line, referred to by counsel as indicated on this map by four lines.
A. By four lines? This is the water line.

Mr. Moser: By "this" you mean what?
Witness: The heavy line. The southernmost line is the water line. The other lines represent water.

Q. When was this map made?
A. In 1920.
Q. When was that line made, do you know?
A. 1920.
Q. Well, what day?
A. I can't tell you offhand.
Q. You don't know whether it was the spring or summer?
A. In the summer.
Q. Sometime late in the summer?
A. It was made in July. I shan't tell you the date.

Mr. Shepard: All right. That's all.

(To Mr. Sutherland:)

Q. Mr. Gray, were you employed by the Ontario Beach Hotel and Amusement Company, or their predecessor as lessee, with relation to laying out any of the walks and sites for buildings on that part of what we call Ontario Beach Park, which is north of the present line of Beach avenue and east of Broadway or Lake avenue?
A. Yes, sir.

Mr. Sutherland: This part, your Honor, is on our defense of an equitable estoppel. I propose before the case is finished to give the [fol. 388] Court some idea of what was done in the way of open and visible improvements upon this property, so far as that bears on the defense of estoppel.

Q. Mr. Gray, will you tell us what you did, or saw done, in the way of improving that part of the land in question which I have referred to?
A. First, I staked out the Hotel Ontario, and gave them elevations from which to build their building. Then I laid out the sidewalks around the Hotel Ontario, and running north to a sidewalk running east and west along the front of the land. Then I located a bath house and a slide, a bathers' slide, running out from the beach out into the lake. After that—Well, I gave some stakes, various stakes around so as to grade off the surface of the property to a plane. Then I laid out a street there called, I think it was called the "Midway," the line of the street, whereby they could lease to different concessions and concessionaires. I think that's about all.
Q. Do you know for a fact that those roads and walks were constructed?
A. Yes, they were.

Q. And buildings were erected?
A. Yes, sir.
Q. By the lessee?
A. Yes, by the lessee.
Q. The Ontario Beach Hotel and Amusement Company?
A. Well, first it was——
Q. (Interrupting.) Or its predecessor as lessee?
A. Yes.

Mr. Sutherland: I offer in evidence now, Your Honor, the map of the Village of Charlotte, made in 1902, Lathrope's map, Plate 24, Village of Charlotte. This is the Liber from the County Clerk's [fol. 389] office, entitled, "Atlas, Monroe County Maps." Counsel will concede, I assume, that this liber is in constant use as a public record.

Mr. Oviatt: Judge, I'm going to insist on maintaining my position that anything you produce must be authentic.

(Whereupon the map referred to was received in evidence as "Defendants' Exhibit Number 10.")

Q. Will you look now at the situation of the buildings and the balloon track, and the walks and structures on that part of the property labeled there, "Ontario Beach Park," north of Beach avenue and east of Broadway?
A. Yes, sir.
Q. Between Broadway and the Genesse River?
A. Yes, sir.
Q. Does that fairly represent the situation of the biuldings, walks and other improvements as they existed in 1902?
A. I think so, all except the balloon; that lost some of its gas.
Q. Well, what do you mean by that?
A. It is not so symmetrical as it was laid out.
Q. But the situation of the buildings and walks, and so forth, is correctly shown there as it was in 1902, according to your recollection, is it?
A. Yes, substantially, yes, sir.

Mr. Sutherland: Very well. That's the purpose of the map, your Honor.

(To Mr. Moser:)

Q. Mr. Gray, on that map, Exhibit 9, is that map drawn according to the scale that you have indicated on here of one inch to thirty [fol. 390] feet?
A. Yes, sir.
Q. Is it drawn accurately according to that scale?
A. Yes, sir.
Q. And all of the objects on the map shown accurately according to that scale?
A. Yes, sir.

Q. And all of the buildings and other improvements indicated on that property were actually there on the Bartholomay Company's property at that time?

A. At that time.

Q. According to the various legends that appear on the map?

A. Yes, sir.

Q. I take it that the buildings are enclosed in red.

A. Enclosed in yellow.

Q. Oh, is that yellow?

A. Yes.

Q. And adjoining these buildings, each building, is a dotted line: what does that indicate?

A. Represents the verandas or porches.

Q. Of what material were these buildings constructed?

A. All those colored in this color are wood.

Q. Frame buildings?

A. Frame buildings.

Q. Now, there seems to be a vacant space in the angle formed by Lake avenue and Beach avenue.

A. Yes, sir.

Q. Was there formerly any improvement on that corner?

A. Formerly a pavilion there, very large pavilion.

Q. And what became of that?

A. Burned down.

Q. Do you know how long ago?

A. Well, I can't tell you the year, some years ago.

Mr. Moser: I think that's all.

[fol. 391] Cross-examination (to Mr. Oviatt):

Q. Referring to Exhibit Number 9 of the defendant, I call your attention to the two lines which you have marked, "Low water mark, 1887?"

A. Yes, sir.

Q. And, "Low water mark of 1890."

A. Yes, sir.

Q. And I ask you from where you got the data to indicate that level.

A. I took it from the Government Bench.

Q. Then, taking it from the Government Bench did you lay it out on the land as you have indicated it here on the map?

A. I laid it out on different places.

Q. That is, you set a number of points and then drew your line?

A. Yes, sir.

Q. You haven't indicated, I notice, upon that map, any high water level for any year, have you?

A. No.

Q. And are you familiar with the Government levels?

A. Yes.

Q. Are you familiar with the fluctuations of the lake?

A. Yes.

Q. Did you hear the testimony of Captain Preston?
A. Yes, sir.
Q. Do you agree with him that there is a variation in the fluctuations of the lake from year to year of five feet and a half?
A. Yes, sir.
Q. Can you tell me what was done to erect those sidewalks which are shown parallel with the water line?
A. What was done?
Q. Yes. I mean the process of building, foundation, and what was put in for them, and that sort of thing.
A. Why, the foundation was a regular stone foundation, I think, made of slag, slag mixed with cement and sand.
[fol. 392] Q. How deep below the level of the ground as it existed when the sidewalks were built did you go down for your foundation?
A. I can't tell you that; I didn't build the sidewalks.
Q. How far above the level of the land as it then existed was the surface of the sidewalk parallel to the water line?

Mr. Moser: You mean the time this map was made?
Mr. Oviatt: No. When the sidewalk was built.
Mr. Moser: He says he doesn't know.

A. Why, it was right at the water line.
Q. And that is the water line which you have indicated by these two lines, 1887 and 1890?
A. Yes, sir.
Q. You haven't indicated on that map any other elevation above sea with reference to any of the territory excepting only the water line level?
A. That's all.

Mr. Sutherland: Now what map are you referring to?
Mr. Oviatt: The same exhibit, Number 9.

Q. And you haven't indicated upon that map in any place at all the level of any particular point as above the lake level?
A. No.
Q. Nor with reference to the low water level of the lake as indicated by the line of the water in the years 1887 and 1890?
A. No.
Q. Have you any data from which the elevation of any particular point in this area could be shown, either as above sea level or as above lake level?
A. Yes, sir.
[fol. 393] Q. Where is that data?
A. In my office. Now, let me explain something to you.
Q. No, Mr. Gray. Just a moment. I want to conduct the examination strictly according to Hoyle.
A. All right.
Q. You say that sidewalk, as indicated there with reference to the level of the low water, is practically on the level of that low water?
A. Yes, sir.

Q. Did you say, on direct-examination, that some of the ties which were dumped in north of Beach Avenue were dumped in in water?

A. We went down,—in laying the railroad we went down to water.

Q. Were any of the ties which were dumped in on the surface of the then existing territory put in in any water at all?

Mr. Sutherland: Excuse me. You haven't quotation marks around "dumped in," have you? Is that his phraseology?

Mr. Oviatt: No. But you don't object to my saying "dumped in," do you?

Witness: No. But they were laid

Q. They were laid?

A. Yes.

Q. Laid with some care?

A. Put in side by side.

Q. Side by side?

A. Yes, sir.

Q. Very well. I will change my phraseology. These planks which were so carefully laid in side by side on this territory were laid in carefully in order to hold the dirt above, were they not?

A. Yes, sir.

[fol. 394] Q. And these carefully laid in ties were laid in next to each other and abutting each other, were they not?

A. Yes, sir.

Q. And were any of these ties, so carefully and thus laid in, laid in the water?

A. I think perhaps some of them might have been.

Q. And where was that water which existed on the surface of the territory upon which these ties were so carefully laid? Where did you find that water?

Mr. Sutherland: The question is objected to on the ground that it involves the assumption that the witness has said the water was on the surface of the territory when these ties were so laid. I do not understand that the witness has so testified; but, on the contrary, that an excavation was made until they got down to the water where these underlying ties were laid. Now, if I'm wrong I'm sorry to interrupt.

Mr. Oviatt: I think there are two reasons why the question should be allowed. First, that you are wrong, and; second, the question is perfectly proper on cross-examination. But not to disturb the Master with the reading of the record I will revise my question in any event.

Q. You stated that some of the ties were laid in water as the result of excavation for the railroad?

A. Yes, sir.

Q. You also stated that other ties were laid in on water which existed on the surface, did you not?

[fol. 395] A. No. Don't misunder- me. There were ties laid after the double line of pipe was put through, the double line of pipe to carry the water from that creek to the river.

Q. So you first drained the water?

A. We first drained the water.

Q. And was there no water there before the double line of tile was laid?

A. Oh, sure.

Q. And, as a matter of fact, I suppose the track was first laid and used for the purpose of carrying in the additional ties which were used in other areas, wasn't it?

A. Well, yes.

Q. You first laid out your course for the track, put in your track and ballasted it, and then drew in the rest of the ties which were used in whatever remaining areas were filled?

A. Wherever it was necessary.

Q. Yes.

A. Over that area and around it.

Q. Now, as a matter of fact, some of these ties which were drawn in on the railroad after the railroad was completed, at least, so far as the construction of the railroad was concerned, were thrown in on places of the land where there was water?

A. Wherever we made an excavation and put in tile——

Q. (Interrupting.) Mr. Gray, I would like to ask you to say, "Yes," or, "No," to that question.

A. Yes.

The Master: Now you can go ahead and make your explanation.

Witness: Wherever you make an excavation and put in tile, where [fol. 396] you cover that that cover is bound to settle. You can't put all the material back in that you had, that you took out, and, in that case, this being a particularly hazardous case because any part of that beach there was susceptible to having water clear back the whole extent of it, of the level of the lake, to keep the sand and everything from dropping down we put in ties at those places, put them close together and butted them so as to hold up the material we had put on to level up the level of the ground.

Q. And that was to prevent the waters of the lake from coming in and carrying away your track?

A. Wouldn't carry it away but would let it down.

Q. Let it down?

A. Yes.

Q. So it was to prevent the waters from the lake from returning and making your fill-in settle down farther?

A. Yes, sir.

Q. So the purpose of putting in the ties and construction which you did carry on there was done with the idea that the plan was suitable to preventing the waters from the lake from returning and settling down your fill?

A. That's right.

Q. And you had that clearly in mind as part of your plan?

A. Certainly.

Q. And you at that time represented the New York Central Railroad?

A. Yes, sir.

Q. And you were being used to devise the plan of the fill-in and of the construction of the railroad?

A. I will have to qualify that as to the New York Central Rail-
[fol. 397] road. Yes; that was the New York Central Railroad, yes.

Q. So that the plan that you had in making this fill, as you have just described it, was the plan which you made in pursuance to your employment?

A. Yes, sir.

Q. I call your attention to Defendants' Exhibit Number 8, and I specify particularly the location of the water line designated on this map as "Shore Line," and to the three lines indicating three water lines. I understand you to say that the orange line is the location in March, 1874; am I right?

A. Yes, sir. It was made in 1873. The date of the map was March, 1874.

Q. At the eastern half of the exhibit, so far as it contains the water lines, the water line of 1874 is farther out in the lake than either of the waterlines of 1900 or of 1884; is it not true?

A. Yes, sir.

Q. So that with the piers already in existence, and these northerly winds, and the blowing of sands, and the current in the lake, and all the other causes to which you have testified, you find that of the three water lines the farthest one out is the earliest one?

A. Yes, sir.

Q. And in the westerly half of these three water lines you find that the farthest one out is the latest one?

A. Yes, sir.

Q. Averaging up the areas lying between these three waterlines throughout the entire width of the premises east of Lake avenue you find that the acreage represented by the loss between the original water line in 1874, and the latest water line in 1900, is greater than the acreage of the gain in the western part, did you [fol. 398] not?

A. Yes, sir.

Q. And very substantially?

A. Yes, sir.

Q. Now, will you tell us how far further out the water line was in 1874 than it was in 1884 on the line drawn about parral-el with the west side of the Spencer House?

A. (Witness scales map.) About seventy-two feet.

Q. I think you stated upon your direct-examination that the influence of the pier would be to cause the southeasterly angle between the pier and the water line to be filled up more rapidly and to a greater extent than the territory to the west, did you not.

A. I don't think I testified any such thing.

Q. Did you say anything about the tapering off of the amount of Beach extended out into the lake from the pier westerly?

A. No, sir.

Q. Have I got the wrong witness?

A. I think you have.

Q. I think you said also in your direct-examination that according to your recollection the water line in 1874, talking from recollection purely, was about the same location as the water line now.

A. Well, I don't know about that, but it wasn't far out of the way.

Q. Now, around the outside of this balloon track, where it is nearest to the lake, and throughout an arc of perhaps ninety degrees, you erected some sort of a barrier against the washing of the waves, did you not?

A. No. But later on there was a storm came up, with high water—that was in 1887—and it washed in there clear up to the track; and then Mr. Weston brought down some carloads of stone [fol. 399] from Buffalo or Tonawanda and put it in there to save his tracks.

Q. To save his tracks from what?

A. From washing out, being undermined.

Q. By the water?

A. By the water.

Q. And the intention of that was to prevent the natural action of the lake from destroying the structure which you had erected; is that right?

A. That's the idea.

Q. And that was the only intention that existed for drawing the stone and in putting them on the track?

A. That's all.

Q. Recently there has been erected along this water line, and some distance from it, perhaps, a concrete wall of some kind, has there not?

A. Yes, sir.

Q. How recently was that concrete wall erected?

A. Why, I don't know. I think it was 1921, but I won't be certain.

Q. And that concrete wall extends from the pier on the east to Lake avenue on the west, or farther?

A. Well, it doesn't go to the pier.

Q. How near to the pier does it go?

A. Why, I should say a hundred feet or so.

Q. And starting at a point a hundred feet west of the pier, how far does the concrete wall go?

A. Well, there are two walls. Now, I haven't measured those. There are two walls, one out farther than the other; the eastern wall being out several feet farther than the other.

[fol. 400] Q. Are there two walls parallel with each other?

A. Yes, I should think there would be.

Q. And how far is it between the two walls?

A. I should say thirty or forty feet, fifty feet in width.

Q And how far from the water line is the nearest of the two walls to-day, for example? Just roughly, Mr. Gray.

A. I don't know. A hundred and fifty feet, I should say.

Q. And then the next wall is within that thirty or forty feet?

A. The next wall, yes.

Q. What was the purpose of erecting these two walls?

A. I haven't any idea.

Q. Is there any apparent purpose, so far as any structures down there are concerned?

A. Not that I can see.

Q. The walls are not serving any purpose that you can understand?

A. No.

Q. And you, as an engineer, and knowing the lake action and the drift of the sands in that locality, what would you say the purpose of those walls was?

A. I should say to spend money. I can't think of anything else.

Q. Just a reckless disregard of economy?

A. That's what I think.

Q. And you, upon your reputation as an engineer, and understanding the natural forces at work on the lake shore, can conceive of no purpose that those walls serve?

A. Not those two walls, no. If there was one wall in a continuous line I might say.

[fol. 401] Q. What would you say if it were one wall in a continuous line?

A. Why, it was put there to prevent a wash undermining the walk.

Q. That is, in your opinion, you know the condition in that particular locality and the location of the walks are such that it might well be expected that the lake would undermine the sidewalks except for these walls?

A. Yes, sir; but not at this low stage of water.

Q. Not at this low stage of water?

A. No.

Q. In other words, a rise in the low level is to be expected?

A. Yes, sir.

Q. And that rise to be expected would undermine the walks?

A. Yes, sir.

Q. And these walls would be put there to prevent an inevitable rise in the lake which would undermine the walks?

A. Yes, sir.

Q. And the rise in the lake to a sufficient extent to undermine the walks is about as certain as taxes, isn't it?

A. Yes, sir.

Q. And your opinion, as an engineer, is that that lake would return to undermine the walks except for the wall?

A. Well, I have seen it come back several times.

Q. I call your attention to Exhibit Number 8, and to the designations appearing upon it in red, which I think you testified were willow trees?

A. Yes, sir.

Q. And I think you testified that those willow trees were all of approximately the same size?

A. Substantially.

Q. I show you Defendants' Exhibit Number 7. That represents the photograph of the Spencer House as of what particular year, [fol. 402] do you know?

A. No, I do not.

Q. It must have been in a year between 1873, when the Spencer House was erected, and the date of the Spencer House's burning, of course?

A. Which I think was 1879.

Q. So that that picture represents the state of affairs between 1873 and 1879?

A. Yes, sir.

Q. And you will notice upon that photograph certain trees?

A. Yes, sir.

Q. Are those trees part of the trees which you now find at the lake in this locality?

A. I don't think there is one of them there.

Q. You don't think there is one of them there?

A. No, sir.

Q. You think those trees are all trees which have been destroyed?

A. Yes, sir.

Q. Have you any knowledge of that fact?

A. Well, I don't find any location of any trees that comes within the bounds of the Spencer House.

Q. No. You're quite right.

A. And they had concessions all along there, and shows, and one thing and another.

Q. So that in your opinion these trees shown in the Spencer House photograph are not any of them trees which are represented on this Exhibit Number 8?

A. I don't think they are.

Q. I think you are right about that. I call your attention to the lines upon Exhibit Number 8 in orange, and parallel, running from Lake avenue just north of Beach avenue, southeasterly, and crossing [fol. 403] the north side of Beach avenue at their eastern extremity; those lines are what you called McIntyre's ditch, are they not?

A. Yes, sir.

Q. Tell us the condition of that ditch at the time that you first saw it in 1873.

A. It was just simply a ditch with a little or no water in it. It had been excavated to take the overflow water, I suppose, from that creek.

Q. I think that you said that these ties were laid next to each other to prevent the material on top from disappearing.

A. Yes.

Q. Did I understand you to say that prior to filling in with the ties you had filled in with some slag?

A. No. I said that was on the railroad.

Q. On the railroad?

A. On the railroad.

Q. And whereabouts, Mr. Gray?
A. Why, on that balloon track.
Q. On the balloon track?
A. Yes. We ballasted it.
Q. Well, then, you spoke of the fact that some slag which had been thrown in there had now disappeared.
A. Yes, sir.
Q. Where had you thrown slag in there which has now disappeared?
A. Why, where that balloon track was located.
Q In other words, the bed of the balloon track where the slag was thrown in was of such a character that when the slag was thrown in there the slag disappeared and sunk out of sight?
A. Yes, sir.
Q. And all of the slag which was dumped in there has now disappeared by having sunk through the sub-stratum of sand?
A. I think it has; I couldn't find any.
[fol. 404] Q. How much slag did you dump in there which has thus disappeared?
A Why, whatever the amount was necessary to ballast up that track.
Q And how many carloads would you say that was?
A. I wouldn't estimate it.
Q. Well, would you say it was more than a thousand?
A Oh, no.
Q. More than five hundred?
A. I should think it might have been five hundred.
Q So that five hundred car loads of slag dumped in this locality have disappeared by sinking through the sub-stratum of sand?
A. Now, I don't know about that, whether they used all slag or not, because I didn't lay any track. I simply gave them the stakes and grades and Mr. Weston made the track.
Q. But whatever slag was put in there has disappeared?
A. Yes; I don't find any evidence of it.
Q. And was that slag put on top of the ties?
A. On top of the ties.
Q. And that slag has disappeared even from the top of the ties?
A. Yes, sir.
Q. And can't be found?
A. I haven't found it.
Q. Now, over how wide an area in this locality east of Lake avenue and North of Beach avenue was it that ties were laid carefully in order to furnish a foundation for soil to be thrown on top?
A. All along this ditch where—not along the ditch, but along side of that ditch where we put that tile in to carry off that water. [fol. 405] The tile came down along here pretty close to the north line of where Beach avenue is now.
Q. Subsequent to the filling in by the railroad at the time of the balloon track in 1884, do you know of any subsequent fill-ins?
A. No.

Q. Do you know about placing soil on top of the fill in order to cause vegetation to grow?
A. No, but I suppose it was done.
Q. You know that the soil on which the vegetation is growing there now is not soil that you put there to fill in with?
A. I know it is not.
Q. You know it is not, and you know it is not sand.
A It is loam.
Q. So that you do know that after you finished your filling some one else filled in a top layer of fertile soil?
A. Yes, in order to get it solid.
Q And you don't know who that was, or when it was done?
A. No.
Q. The tree that was cut there, was that cut for the purposes of determining the age of the trees for this law suit?
A. That I do not know.
Q. It was a perfectly good, healthy tree?
A. So far as I know.
Q. And was cut this summer?
A. Yes, sir.
Q. Now, was that the largest tree on those premises?
A. No.
Q. It was not?
A. No, sir.
Q. There were many trees smaller than that, though, weren't there?
A Oh, yes.
Q. You state that the yellow line upon Defendants' Exhibit 8 was made from the survey of McCool, in 1873?
A. Yes, sir.
[fol. 406] Q. There was a map made to illustrate that survey, was there not?
A. Yes, sir.
Q. And where is that map?
A. In court here.
Q. May I see it, please?

(Whereupon the map referred to was produced and handed to Mr. Oviatt by one of the counsel for defendants.)

Q. I show you a map produced by counsel for the defendants, and I ask you if that's the McCool map to which you have referred.
A. Yes, sir.

Mr. Oviatt: I ask to have that marked for identification.

(Whereupon the map referred to was marked, "Plaintiff's Exhibit 6," for identification.)

Q. The map which has just been marked for identification is the map which you used in making the data which you placed on Defendant's Exhibit 8?
A. Part of it.

Q. If I understand you you mean that Exhibit 8 was not entirely prepared from that map.

A. No.

Q. But that the McCool map contains all of the matters which were involved in the McCool data, which data were placed on this Exhibit 8?

A. Yes.

Q. You stated upon your direct-examination that there was a break in the pier which let the water into the hollow.

A. Yes, sir.

Q. Am I right?

A. Yes, sir.

Q. What hollow do you refer to?

A. Right south of the Spencer House.

Q. What caused the break in the pier?

A. I don't know.

[fol. 407] Q. It was a natural break?

A. I haven't any idea.

Mr. Sutherland: Did the witness use the word, "hollow"?

Mr. Oviatt: Yes, he did.

Q. And when the pier broke the waters flooded this indentation which you have spoken of, and in which Pit Number 14 is shown upon Defendants' Exhibit 8, and filled up that locality as indicated on Exhibit 8, naturally, did it?

A. Filled it up naturally?

Q. Yes.

A. I don't understand.

Q. Did the waters just flow in there and fill up that?

A. Yes. McIntyre used to keep his boats there.

Q. The Finley areas were said by you to be erroneous in some particular, were they not?

A. Yes, sir.

Q. And as those areas appear upon what document?

A. As they appear right on this map here.

Mr. Sutherland: What map are you referring to? What exhibit number?

Mr. Oviatt: Defendants' Exhibit 8.

A. By his field notes he starts at the west line of Water street, as indicated by a distance from the east line of Lake avenue or Broadway, as they called it, and parallel to it.

Q. Yes.

A. Then he ran west; then he ran around, and when he ended up he ends up 26.18 west of the west line of Water street, and 16.57 south of the south line of the lot.

Q. Now, have you indicated upon Defendants' Exhibit 8 the error which you thus claim exists in the Finley survey?

A. Yes. Right here (indicating on the exhibit).

[fol. 408] Q. No. I mean so far as his terminus of his line.

A. Oh, yes, the terminus.

Q. Now, the terminus of the notes shows upon Defendants' Exhibit 8 just north of the word, "Lot No. 22," in blue, reading, "Finley ending," with an arrow pointing to a circle?

A. Yes, sir.

Q. Finley, in running that line, started at the southeastern corner of Lot Number 21, did he not?

A. Yes.

Q. And he ran west along the south line of Lot 21?

A. Yes, sir.

Q. Then he ran north along the east line of Lake avenue, did he not?

A. Yes, sir.

Q. Then, how did he determine his next course?

A. South 47, East, five chains and ninety-four links.

Q. And he used a compass?

A. Yes, sir.

Q. No where in Finley's notes is there any way of ascertaining the angle between the east side of Lake avenue and the course which Finley ran easterly from Lake avenue, is there, except by the compass?

A. Except by the compass.

Q. Do you know the difference in variation of the compass between 1803 and 1921, is in this locality?

A. Three weeks ago it was eight degrees and forty-four minutes.

Q. That's in accordance with government records?

A. Yes, sir.

Q. And did you use that variation in compass in following out the Finley line east from Lake avenue?

A. I did not use the compass at all except as he had it on paper. I reduced it to angles.

Q. You reduced it to angles from some appearance on what paper?

A. Why, from his notes. His notes go by courses. I reduced his [fol. 409] course to angles.

Q. So that in fixing your angle between the first Finley course east of Lake avenue and the easterly line of aLke avenue you scaled Finley's map for angles and used that?

A. I did not. I took the angles as indicated in his note book, or his courses as indicated in his note book, and reduced them to angles, and plotted them from that. Finley's map was too small to scale.

Q. And in reducing that to angles you used that angle on your transit?

A. Yes, sir.

Q. Did you use the compass at all in your work in laying out the Finley lines?

A. Not a bit.

Q. It would be impossible, would it not, for any one to run the Finley line to-day by the use of a compass?

A. I think it would.

Q. And in order to run the Finley lines to-day the compass bearings have to be recalculated into angles?

A. Yes, sir.

Q. And that's what you did?

A. Yes, sir.

Q. In saying that the figures of his notes show 3.21 acres in Lot 21 by Finley, and that the area given by Finley was 3.69 acres, you did not use in your calculations the sub-sections 1 and 2, did you?

A. No.

Q. So that if you used your calculations for sub-sections 1 and 2, and added that to the other, would you approximate the Finley acreage?

A. I don't know; I didn't figure that up.

Q. In other words, you want to correct your testimony. There may or may not be a mistake in the Finley acreage. You don't know.

[fol. 410] A. There may or may not be.

Q. That is, you testified this morning on the assumption that those sub-sections were included, and you find out they are not.

A. Yes. Well, I don't know. I haven't gone over them.

Q. No, you don't know; but what I mean is you are not prepared to restate your testimony as to the difference?

A. No.

Q. You stated that the boundary of the swamp on Defendants' Exhibit 8 is indicated by the dotted line at the lower edge of this exhibit, did you not?

A. Yes, sir.

Q. And you used for plotting that line a map drawn by Cornell in 1854?

A. Yes, sir.

Q. Have you that map here?

A. Yes, sir.

Q. May I see it, please?

(Witness produces the map referred to and hands it to counsel.)

Q. I now show you the map which you have produced as the Cornell map of 1854, from which you got your data to outline the swamp on Defendants' Exhibit 8, and I ask you to notice that portion in the upper right hand corner of the land, reading, "Land encumbered with stone." That refers to the area covered with the stone which was intended for use by the Government in the construction of a pier, does it not?

A. I think it does.

Q. Scale that area of the land encumbered with stone, and tell us how large it is, please.

A. Seventeen chains and eighty links long, by four chains and seventy links wide.

Q. And will you for the purposes of the record give us an approxi-

[fol. 411] mate equivalent of that in feet?

A. Yes, sir. 1175 feet, in round numbers, I compute that; 1175 by 310.

Mr. Oviatt: I ask to have this map marked for identification,

(Whereupon the map referred to was marked, "Plaintiff's Exhibit 7," for identification.)

Q. South of Beach Avenue in 1884 the Railroad filled in the swamp to make a baseball park, did it not?

A. I don't know as they filled it in for that particular purpose.

Q. Haven't you so testified?

A. No.

Q. You have no knowledge at all what the fill was made for?

A. Why, for railroad purposes, I suppose. In the first place the single track came down there and unloaded their passengers south of Beach Avenue, and afterwards they extended through to the lake, and afterwards they built the balloon track.

Q. The swamp south of Beach Avenue was in places so deep that in making your survey in 1874 you had to swim, did you not?

A. Yes, sir. That was 1873 and '74.

Q. So that this swamp south of Beach Avenue was at times so loaded with water that a man had to swim to get through it?

A. Oh, yes.

Q. And how deep was the water?

A. Well, we used twenty-four foot hob poles or stakes. I guess there must have been at least sixteen feet of water.

Q. So that this part of the land south of Beach Avenue, in part at least which has been called swamp, had sixteen feet of water [fol. 412] in it at times?

A. I should think so.

Q. And how large an area would that depth of water cover in this so-called swamp?

A. Why, it was a great big pond.

Q. And that is the area which is referred to on these maps and by the witnesses as the "swamp?"

A. Yes, sir.

Q. Now, these ties that were filled in in north of Beach Avenue were filled in below the level of the lake water, were they not?

A. Why, right at the level of the lake water and a little below, too.

Q. And a little below?

A. Not very much.

Q. In other words, the ties which were filled in here were lower than Lake Ontario's surface?

A. At that time.

Q. The fill-in that you made north of Beach Avenue was two or three feet deep, was it not?

A. Yes; I should imagine it might be two feet deep some places.

Q. Shepard didn't fix his line at the northeast corner with reference to any water, did he?

A. No.

Q. Shepard's northeast corner——

A. I forget just how that reads.

Q. Just a moment. Shepard's northeast corner of his survey was not at the water, was it?

A. I don't know; I've forgotten.

Q. But your tracing out Shepard's line and your knowledge of that locality, and as an expert, you are prepared to state, are you not, that Shepard's corner was not at the water?

A. No, it wasn't.

Q. It wasn't?

A. No.

[fol. 413] Q. Do you know how far from the water it was?

A. I do not. I wasn't there.

Q. Taking up the creek; the creek which ran west of Lake Avenue in Charlotte, originally, and in your recollection, flowed right out from the southwest corner of the land north of Beach Avenue and east of Lake Avenue, northeasterly into the lake between Lake Avenue and the balloon track, did it not?

A. I never saw it go into the lake.

Q. Now, Mr. Gray, you have testified with reference to this locality before, have you not?

A. Yes, sir.

Q. Now, without reference to that testimony, I ask you if your recollection of conditions down there at the point in question is today as clear as it was a year or two ago?

A. Just the same.

Q. Just the same? So that what you stated two years ago in your testimony was correct?

A. Yes, sir.

Q. Do you recollect what you said?

A. I don't know as I do.

Q. Now, be as careful as you can, and state your very best recollection as to the course of the creek running north on the west side of Lake Avenue, after it crossed Lake Avenue in the vicinity north of Lot 21.

A. In the vicinity north of Lot 21?

Q. Yes. Where did it run from the time it struck the area included north of Beach Avenue and east of Lake Avenue.

A. Down that ditch, that is, the major portion.

Q. You are now pointing your ruler along the orange line showing the McIntyre ditch?

A. Yes, sir.

[fol. 414] Q. And you have said the major portion ran down there?

A. Yes, sir.

Q. Where did the rest of it run?

A. Ran all over the territory. When that water came down from that creek and struck the flat it struck an obstruction and it spread right out just like that. It followed any low place it could find.

Q. And until what year did that occur?

A. Why, it occurred till 1916. That was the last observation I had.

Q. So you now say that the creek never ran into the lake without first going into the river?

A. I never saw it go into the lake.

Q. Now, then, you say this McIntyre ditch was along the natural [fol. 418] water course of the creek then, do you?

A. I do, yes.

Q. No question about that, in your present recollection? A. Not in my mind, no.

Q. Did you testify as follows in the condemnation proceedings: "Throughout its entire extent was it artificially made? A. Yes, sir"?

A. Yes. I will say that now; but it's natural too, at that.

Q. Then did you testify as follows:

"Q. Was there a natural water course somewhere in that general locality that had to be provided for?

A. Yes, sir."

Did you?

A. Why, I don't know; I don't remember that.

Q. You don't remember whether you did or not?

A. No, I don't recall it.

Q. Well, would you say now that there was a natural water course somewhere in that general locality that had to be provided for by the ditch?

A. The lowest——

Q. No, no, no, Mr. Gray, please. "Yes," or, "No."

A. I will say now that that McIntyre ditch went through the place of least resistance; otherwise, it would have never been dug.

Q. Now, did you testify as follows, at a subsequent point in the same proceedings: "Where did that go, do you remember?

A. Yes. It went down across the boulevard to enter the lake in a substantially northeasterly direction, and there was another branch that went over the south side of Beach avenue, west of the boulevard, and went off in an almost northerly direction. That was what you [fol. 419] might call an overflow drain. In times of high water it would run all the while, but this other one ran all the while." Did you so testify?

A. I testified——

Q. "Yes," or, "No," Mr. Gray.

A. (Continuing:) —that northwesterly one, running substantially in a northerly direction, did run at times of high water, and the other one did run all the time.

Q. Mr. Gray, you have to understand I am trying to follow a technical method of procedure, so I have to get definite answers. I am not examining you to be disagreeable. Did you testify that this creek ran northeasterly into the lake?

A. Well, I——

Q. "Yes," or, "No." I have got to have, "Yes," or, "No."

A. Well, if you have got my testimony there I have to say, "Yes."

Q. That won't do me any good. What is your recollection as to whether you so testified?

A. My recollection is I don't recollect that I said that, Judge.

Q. You don't?

A. No, I don't.

Q. Well, would you say that it was, or was not, true to-day, that it ran in a northeasterly direction into the lake?

A. I would not say it was true; I couldn't.

Q. Did you testify as follows in the condemnation proceedings:

"Q. You were pointing, Mr. Gray, to the general direction in which this old creek ran in a northeasterly direction. Just for the purposes of the record, will you state again how this creek ran, describing the land it closed?"

And then did you answer as follows:

"It ran substantially from where these yellow lines or orange lines [fol. 420] intersect or bisect the east line of Lake avenue, (Mr. Oviatt indicated the point on Defendants' Exhibit 8) in a northeasterly direction, so it would put her where the extreme western edge of the balloon track—about in that direction, and then into the lake."

Did you so testify?

A. If I did——

Q. Just "Yes," or, "No," Mr. Gray.

A. Yes.

Q. Now, that testimony which you have now stated you did give in the condemnation proceedings, would cause this creek to run generally from a point which I am now marking as "A" on Defendants' Exhibit 8, to a point somewhere in the vicinity of the point "B" which I am marking upon the same map, would it not?

A. Yes.

Q. Now, then, with reference to that, having stated that this creek ran from a point, "A," to the vicinity of a point, "B," would you say that you did or you did not testify that the McIntyre ditch was artificially dug to take care of a natural water course?

A. Well, I say that now. There was a low place and they put a ditch through there to take care of it.

Mr. Oviatt: That's all, gentlemen.

(To Mr. Beach:)

Q. Mr. Gray, with reference to this slag: you say that it disappeared?

A. Yes, sir.

Q. How many of those test pits went around that foundation that you discovered?

A. Only one.

Q. And was the slag put south of Beach avenue in that swamp section?

A. Yes.

[fol. 421] Q. And you have stated also that you put in some sand or something that you drew from other places, in this foundation?

A. Yes, sir.

Q. And in reference to this yellowish colored, or whatever it was, material, you now state, in answer to Mr. Oviatt's question, that it

was fill. Do you mean to be understood that that was all artificial fill, or some natural fill?

A. I don't know how it was done there. I think some of it was natural fill, brought down by the floods from that creek.

Q. In other words, have you seen that creek at high water?

A. Oh, yes.

Q. And you stated that within a few years it flooded out over Lake avenue and Beach avenue and covered the whole section there?

A. Yes, sir.

Q. With a muddy deposit?

A. Yes, sir.

Q. And you stated, as I understand you, that this locality of Mr. McIntyre's ditch was a low section?

A. Low section, yes, sir.

Q. That was the natural water course?

A. That was the easiest place to dig a ditch to carry this water off.

Q. And when there was high water, then, you stated, that it tended to spread out and would flow——

A. Any direction.

Q. Sometimes it would flow off northerly——

Mr. Oviatt: Mr. Beach, I don't want to make any technical objections, but I think it is unfair to ask leading questions.

[fol. 422] Mr. Beach: This is cross-examination on that point.

Mr. Oviatt: No, this is not cross-examination.

Mr. Beach: On that creek?

Mr. Oviatt: No. I beg your pardon.

Mr. Beach: All right. I will withdraw it.

Q. When did you know, if at all, that a creek went northerly into the lake, under what circumstances?

A. Why, it was a long, long time ago that—Oh, I can't tell you when it was.

Q. When? Before your familiarity with the place?

A. Yes. Well, no. It must have been along about 1873.

Q. But under what circumstances would it do that?

A. Why, the evidences of a creek there, going that way, and a board bridge over it to go over to McIntyre's cottage. The rest of it was inference.

Q. Now, this section along Beach avenue, where this ditch was dug, were there indications there that water had flooded out on sections adjoining and adjacent to the artificial ditch?

A. Yes.

Q. When you speak about lake water coming back to where these ties were located, just what did you mean by that?

A. Why, infiltration under and through the sand.

Q. Underneath the surface?

A. Yes. Even to-day, when they dug these test pits they were all dug to a certain level, and it was level 246 something, and they got water in every one of those pits.

Q. And that's what you meant when you filled those ties in and

dumped them down, and so forth, so that the lake water, filtering [fol. 423] underneath the surface, would not disturb them?

A. Would not disturb them, would not disturb the tracks and the ballast.

Q. Now, the one test pit which was under the foundation of the balloon track was the one away out at the northerly side, was it not?

A. Yes, sir.

Q. And at that point you didn't find any indications of slag?

A. No.

Q. Can you state whether there were some points of that foundation of the balloon track where there was other material put in than slag?

A. Oh, gravel put in.

(To Mr. Sutherland:)

Q. Mr. Gray, I would like to ask you if you are familiar with the Poultney Land Office map of the Town of Greece.

A. Yes, sir.

Q. Copy of which is found in Liber 4 of Maps, in the County Clerk's office, at page 91.

Mr. Sutherland: I will state to the Court that this copy of the map has no date that I see upon it indicating when it was made. The copy was made in 1878, from the map in the Poultney Land Office at Bath, but there is Broadway indicated (showing map to the Master), and I call attention to what appears to be a natural stream running down and entering the lake at a point west of Broadway. May I have this map marked in evidence as the foundation of this testimony?

The Master: You may.

[fol. 424] (Whereupon the map referred to was received in evidence as Defendants' Exhibit Number 11.)

Q. Do you see the part of Exhibit 11 which indicates a natural water course running northeasterly, west of what is now the village of Charlotte?

A. I do, yes, sir.

Q. Where does that stream enter Lake Ontario with reference to Lake avenue or Broadway?

A. At the west side.

Q. West of it?

A. Yes, sir.

Q. Does that refresh your recollection any as to whether the occasional outlet of this creek in high water crossed Lake avenue and broke into the lake east of Lake avenue or Broadway?

A. No, it does not.

Q. Doesn't refresh your recollection at all?

A. No.

Mr. Sutherland: I think that's all.

(To Mr. Oviatt:)

Q. Now, you have been shown this last exhibit referred to by Judge Sutherland, and, with reference to your recollection as to the creek, you stated upon cross-examination, did you not, that you recollected the creek east of Lake avenue and west of your balloon track because you remembered a bridge by which you got to McIntyre's cottage?

A. Yes.

Q. And that bridge was from Lake avenue over to McIntyre's cottage, was it not?

A. No. There was a road ran from Lake avenue over to McIntyre's cottage.

Q. And the bridge was on that road?

A. The bridge was on that road.

[fol. 425] Q. So that the creek was between Lake avenue and McIntyre's cottage?

A. Yes.

Q. And there was a bridge across the water underneath the bridge to get to McIntyre's cottage.

A. It wasn't much of a bridge; it was just a little sluice-way, I think probably about four boards.

Q. But that bridge did cover and provide a roadway and a passageway over a creek which otherwise would have had to be waded?

A. Well, I didn't consider that the creek. I considered everything went down that other way.

Q. Just a minute. You remember the creek between McIntyre's cottage and Lake avenue, and the road with the bridge on it, don't you?

A. I don't remember a single thing about that creek going to the lake, but I remember that bridge, or a bridge.

Q. That bridge was the only communication between Lake avenue and McIntyre's cottage, was it not?

A. No, I wouldn't say that, even.

Q. Do you remember any other bridge?

A. I remember a bridge there, or some boards there.

Q. You say you dumped some gravel in at this balloon track, too?

A. Oh, yes.

Q. How much gravel did you dump in?

A. I don't know.

Q. Carloads of it?

A. Yes, it must have been carloads of it.

Q. And in connection with these pits, did you discover any gravel there that you dumped in?

A. No.

Q. You didn't? So that you dumped gravel in in that locality [fol. 426] in places where we haven't dug pits, haven't you?

A. Why——

Q. "Yes," or, "No," Mr. Gray, please.

A. Yes.

Q. So that if gravel is found down there underneath the surface it may be gravel that was dumped in by you in 1884?

A. Yes.

Q. And you can't tell us how much gravel that you dumped in there?

A. No, because I didn't put it in; the railroad put it in.

Q. So the railroad dumped in three kinds of material, at least; first, ties; second, yellowish or sandy loam; and, third, gravel; am I right?

A. Make it four; slag, too.

Q. And slag.

A. Yes.

Q. Did you find in these pits where they were dug any of the gravel or loam or slag which was dumped in there in 1884?

A. That, I can't tell you.

Q. You couldn't tell?

A. No.

Q. Along the water line where it approaches the pier, and in the vicinity of the pier, is a line of piles driven into the sand, is there not?

A. Yes, sir.

(To Mr. Sutherland:)

Q. Do you say that is on the actual edge of the water, that line of piles?

A. I didn't say so.

Q. Well, I want to understand you. Between that line of piles and the water, the actual water, there is a width of sand, is there not?

A. Oh, yes.

Q. Sand beach?

A. Large width, yes.

[fol. 427] Q. What is the distance from that line of piles to the actual water?

A. Why, I should say, guessing at it, it would be sixty feet.

Q. Who put in this cement curbing or wall that you have described.

A. I don't know.

Q. You say it was 1921?

A. I think the city put it in.

Q. The city was in actual possession of this park property?

A. Yes, sir.

Q. Had taken possession of it under the condemnation proceedings, had razed some of the buildings, had torn them down, and had cleared away the park for the purposes of a city park?

A. Yes, sir.

Q. In 1921, when this cement wall or curbing was put down?

A. Yes, sir.

(To Mr. Moser:)

Q. Mr. Gray, in your cross-examination with reference to this map which you made of the Bartholomay property in 1920, you wanted to make some explanation in connection with the inquiry made of you with reference to the elevations: do you remember what that explanation was?

Mr. Oviatt: He made it afterwards.

Q. I want to give you an opportunity——

Mr. Oviatt: The Court gave it to him afterwards. The Court said, "Then, what is your explanation?" and he gave it.

Q. Some questions were being asked you as to whether you put in elevations above the water level anywhere on this map.

A. I had not put them on at all, anything, no elevations. There are no elevation on here.

[fol. 428] (To Mr. Oviatt:)

Q. Mr. Gray, you stated that in 1916 there was a flood?

A. Yes.

Q. Of the creek waters?

A. Yes, sir.

Q. And that it covered the whole locality with a chocolate colored coating?

A. Yes, sir.

Q. You were not accurate when you said it was chocolate colored, were you?

A. I think it was mud colored.

Q. Oh, dark brown?

A. Yes, yellowish brown.

Q. Was it very dark?

A. Oh, not very dark; just yellowish brown.

Q. Sort of a milk chocolate color?

A. Yes; sort of a Swiss chocolate.

Q. So that the stuff brought down by this creek, whatever it was, was a yellowish brown.

A. Yes, sir.

Q. And, to use articles that we are familiar with, do you know the color of Baker's chocolate, that dark brown baking chocolate?

A. No. I know Swiss chocolate.

Q. Well, at any rate, the stuff brought down by the creek was that character of yellowish brown which we see in the so-called milk chocolates?

A. I can tell you just exactly the color it was. It was just the color of that sandy loam which you find in those pits.

Q. I see. Now, you are quite positive as to this, aren't you?

A. Yes, I am.

Q. And you want now to tell us that the color of the deposit of [fol. 429] the creek throughout a period of years, as you saw it, was the color of the sandy loam in the pits?

A. Yes, sir.

(To Mr. Beach:)

Q. That creek, up by the R. W. & O., ran through a bank of that sandy loam through which a cut was made for the R. W. & O., didn't it?

A. Yes.

Q. And that creek went right through that sandy loam deposit——

Mr. Oviatt: Now, Mr. Beach, I don't want you to lead him.

Mr. Beach: All right.

Q. Did you take any of the fill which you did put in down there from this bank through which the creek flows?

A. No.

Q. Or in that neighborhood?

A. No.

Q. Well, was it the same nature of the soil in that cut where the creek flows as that which you used to fill in?

A. The same nature of soil.

Q. Mr. Gray, Mr. Oviatt read you some things out of your testimony before the Commissioners: I ask you if you were asked this question:

"This water course running northeasterly was blocked up more or less?

A. Yes, from the action of the waves throwing sand in the outlet."?

A. Yes, sir.

Q. And, without reading this, perhaps it is repetition, down where that ditch was dug, that artificial ditch which you found there, that was a natural depression?

A. Yes.

Q. And on either side of that it was a little higher?

A. Yes.

[fol. 430] Q. And on those banks on the side of that natural depression was where the willow trees were which were growing?

A. On one side, yes, sir.

Q. I should say on the side of that.

A. Yes.

Mr. Beach: Mr. Oviatt, do you want to put in that Cornell map as an exhibit?

Mr. Oviatt: No. I don't care to put it in. I haven't had the opportunity of examining it, or studying it, or considering it. I simply used it in connection with the oral testimony.

Mr. Beach: It has been marked for identification.

Mr. Oviatt: It has been marked for identification. I have marked it for identification so that if any question of reference is disputed I should have it: but my examination of Mr. Gray was purely an oral examination.

Mr. Moser: It is in evidence, having been examined by the witness.

Mr. Oviatt: No. I beg your pardon. It is not.
Mr. Sutherland: We offer it in evidence.
Mr Oviatt: Very well.
Mr. Sutherland: As part of our case,—the Cornell map.
The Master: Received in evidence. It has already been marked.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 12.")

[fol. 431] Mr. Sutherland: We want to offer page 71 of Liber 4 of Maps, being map of the Village of Charlotte, made in 1878, by Horace Jones.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 13.")

Mr. Sutherland: We have a large number of maps, your Honor, a series of them, that we propose to offer in evidence when the proper time comes, but we don't understand the plaintiff has closed its case. We have been putting this evidence because we wished the testimony preserved. We have a large series of documents and maps to put in evidence later, but we don't care to do it to-day.
Mr. Beach: Here is another map that we want to put in. (To Mr. Oviatt:) You're familiar with this.
Mr. Oviatt: Yes.
Mr. Beach: I offer in evidence map in Liber 1 of Maps, in Monroe County Clerk's office, at pages 6 and 7.
Mr. Sutherland: Together with the wording on the map.
The Master: The legend?
Mr. Sutherland: Yes.
Mr. Beach: Being a map made in 1829, of this section.

(Whereupon the map referred to was received in evidence as "Defendants' Exhibit 14.")

Mr. Sutherland: In connection with that we will furnish your Honor with Chapter 82 of the Laws of the State of New York, of [fols. 432-436] 1829, which shows a legislative enactment by the State of New York for the appointment of three commissioners to ascertain damages to be paid to land owners for clearing timber off from this land for the purpose of enabling the light from the light house to spread out along a wider area. The map is very instructive as to conditions then prevailing, and shows the timber, and so on, growing on the land in this vicinity. Chapter 82 of the Laws of 1829 authorizes that proceeding by the State of New York, the light house then in existence being a state light house rather than a national light house.
The Master: We will adjourn to Monday morning, October 15th, 1923, at ten o'clock, here.

Last Plaintiff's Exhibit, No. 7.
Last Defendants' Exhibit, No. 14.

[fol. 437] The Master: Are there any corrections to be made in the record?

Mr. Sutherland: I notice one or two that I would like to talk over at noon.

Mr. Abbot: I may have one or two.

CHARLES R. GOW, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination (to Mr. Abbot):

Q. Your name is Charles R. Gow?
A. Yes.
Q. Where do you live?
A. Boston.
Q. What is your business?
A. Consulting engineer.
Q. From what College or University did you graduate?
A. Tuffts College.
Q. In what department?
A. Engineering department.
Q. What has been your business since that time?
A. Since my graduation in 1893 I have followed engineering and engineering construction and part of the time as a practicing engineer, a considerable portion as a contractor, and the last 8 or 10 years principally as a constructing engineer on foundation and subsurface questions of engineering character.

[fol. 438] Q. Whether or not your experience in business has led you to make determinations of the nature of soil for construction and other purposes.

A. Yes. For something more than twenty years I conducted a department in the taking of test borings for the examination and reporting upon the character of subsurface construction in connection with foundation for building and other structures.

Q. That would lead you to determine the question whether material was naturally deposited or artificially deposited?

A. Yes that is usually an element in all of those problems.

Q. How many such examinations do you suppose you have made?

A. Well I should assume upwards of two thousand perhaps.

Q. Have you also lectured at the University of Technology upon those subjects?

A. Yes for six years prior to the War I delivered each year a series of 15 lectures which constituted a foundation course, a course on foundations and subsurface conditions.

Q. What degrees have you?

A. Well I received the degree of S. B. upon graduating and a few years ago, some four years ago, I think had the Degree of Doctor of Science conferred by the same College, Tuffts College.

Q. Are you a member of Engineering Societies?

A. Yes I am a member of the American Society of Civil Engineer-

ing, Past President of the Boston Society of Civil Engineering, and a member of some of the Junior Technical Societies.

[fol. 439] Q. Are there any other data bearing upon your experience in respect to the determination and examination of soils and subsurface conditions?

A. Yes for something more than 20 years I conducted a construction business as a contractor, principally upon underground engineering construction. I constructed either directly or superintendent or as a contractor a large portion of the Boston subway system and many installations of tunnels, sewers, deep foundations, shafts and the like; and in all of those the question of subsurface conditions was an element in the original and subsequent procedure.

Q. It was an important element?

A. Well in that class of work, yes.

Q. You have examined the premises in this suit here in Rochester?

A. At Ontario Beach yes.

Q. Were certain pits, test pits dug there by Mr. Ferguson at your suggestion?

A. Yes.

Q. Have those pits been examined by you?

A. Yes on two occasions. That is all except a few which were excavated subsequent to my last visit.

Q. I will bring that out later.

Mr. Abbot: For convenience your Honor I am going to ask to be allowed to use that to indicate simply the general position of the pits, and some detailed statement will be put in later. The precise position of the pits will be indicated later by Mr. Ferguson. I am simply using this as a chart, for the moment.

[fol. 440] Q. In connection with the examination of these pits, the top elevation of each was determined was it not by a stake driven in the ground?

A. Yes.

Q. Did Mr. Ferguson in each instance furnish you with the elevation of that stake for purposes of measurements in the pit?

A. Yes.

Q. And you used the elevation furnished by Mr. Ferguson as a basis of your determination as to the level at which the various materials appeared?

A. Yes.

Q. Taking up pit No. 14, which is the innermost pit, farthest east and nearest to the jetty, I will ask you whether you found artificial fill in pit No. 14?

Mr. Sutherland: I object to that Your Honor and it probably brings up here immediately an objection which we will throughout maintain. I do not think this witness or any other, should be allowed to testify whether the fill which he finds in pit No. 14, in his judgment is a natural deposit or an artificial fill. It seems to me that that should not be permitted. The witness may describe the character of the various strata of course; and I suppose Your

Honor would allow him to give the composition and the compactness of those various strata, but to substitute the witness' mind and judgment for that of the Court, it seems to me is unthinkable here; to allow him to say that it is an artificial fill and not made by a sudden deluge from the land, deposit carried by water, to allow him to say [fol. 441] that it is artificial rather than natural, put in by machinery or the hand of man rather than blown in or put in by some flood or similar movement of nature.

I object as incompetent, no proper foundation made for it and not a subject of expert testimony under the issues in this case.

Mr. Abbot: Your Honor, now, we have in this case already testimony that there was a large amount of filling, artificial filling done upon this property. I am swearing the testimony of this witness who has had experience in determining the line of demarcation between materials artificially deposited and materials naturally deposited. He had determined as nearly accurately as can be the line which appears in each one of these pits on which natural filling occurred and on which artificial filling was put in. The evidence of artificial filling already appears and the question is to fix the line of demarcation as accurately as we can.

The Master: From this witness' experience in engineering and subsurface construction, he is in the habit of forming impressions as to whether or not certain soil which he finds or substances he finds beneath the surface has been filled in or is a natural accretion. While this is asking for a conclusion of fact, I am inclined to hear the opinion of the engineer. I do not think it is controlling. It is quite conceivable that material of various kinds might have been [fol. 442] blown in or washed in that would be of the same substance as that artificially filled in, but there is some advantage and benefit in taking the judgment or opinion of one who is in the habit of investigating conditions beneath the surface in drilling operations and the like. I will let him answer it.

Mr. Sutherland: Your Honor will permit an exception to that and of course this objection goes to the whole substance of his testimony wherein he expresses any opinion as to whether the strata or land he finds in these pits was artificially filled or whether it was part of the original substance. Now I call Your Honor's attention to the fact that the witness has not indicated anywhere in his testimony that he has had any experience in differentiating between accretion and artificial filling. He has not stated anywhere that his experience covered differentiating between land which has been formed by accretion and land which has been artificially filled.

Mr. Mosher: I think this is a good place to put a stipulation on the record that all of the objections and exceptions which are taken by any party may inure to the benefit of any of the parties, so that each of us wont be taking exceptions.

The Master: The record may show that.

[fol. 443] Mr. Poole: I wish to join in this objection and exception for my defendants Broshard and McIntyre. I would like to have it on the record that for my clients Broshard and McIntyre I object to any testimony as against them on any pit or

excavation on any land outside of property of these defendants, which is far away from this pit 14.

(Examination resumed by Mr. Abbot:)

Q. Taking pit No. 14 which is the easterly pit, upon the so-called New York Central Railroad property, nearest the jetty, and the innermost pit at that point, will you state whether or not you found artificial fill in that pit?

Mr. Sutherland: Now, Your Honor, that question put to the witness I submit is objectionable, not only for the reasons above stated, but it is not clear whether counsel asks the witness to express his opinion as to whether the material itself is artificial, which he finds, or to express an opinion whether that material was artificially deposited.

Mr. Abbot (to witness): Did you find fill artificially placed?

Mr. Sutherland: Certainly Your Honor would not allow a witness to state that in his opinion a certain stratum that he finds there was placed there by artificial means. I cannot conceive that that is [fol. 444] Your Honor's ruling or that Your Honor intended to permit the witness to state that a certain deposit is not the natural original deposit of earth, but contains another substance called fill, without permitting the witness to give an opinion as to how that fill got in there, whether by the hand of man or by some convulsion of nature or other means; whether it was put there by the United States Government or by the land owner. There is a great difference between a witness being permitted to state the nature of something which he finds and being permitted to state his opinion as to how that thing got there. The last question of Mr. Abbot's purports to show how that material got there.

The Master: I don't think the witness is likely to undertake to state who put the substance there nor when, nor by what means, nor do I think if he does undertake to do that, that there will be any difficulty on the part of the Master or the Court, ultimately, in giving proper weight to that statement. Therefore I will let the witness answer.

(Last question read to witness.)

Mr. Sutherland: I object to it as calling upon the witness to give his opinion as to how the deposit was placed where he found it.

The Master: He may answer.

Exception.

A. There were conditions in pit No. 14 that lead me to the be-[fol. 445] lief that the top three feet had been artificially deposited.

Mr. Sutherland: I object to that. He has not described the conditions. He is jumping immediately to the conclusion that it was placed there artificially without stating what he found. That is another reason why the question ought to be excluded. The witness has

not been asked to state what things he discovered there but goes directly to this conclusion. I submit that that should be stricken out and that before the witness states what his conclusion is, as to whether the stratum is artificial or natural, he first ought to state what he found, what he observed, whether it is black or white, green or yellow, thick or thin. He has not described anything that he saw.

Mr. Abbot: That will all be supplied.

Mr. Sutherland: I object on the ground that he has not put it in any order, he should first state what he saw.

The Master: Of course the better order probably would be to ask the witness what examination he made and what he found there, but inasmuch as it makes very little difference, what order is pursued and counsel for the property owners will have abundant opportunity on cross examination to ask those very questions and I will have before me and the Court the net result. I am inclined to let it go in.

[fol. 446] Mr. Sutherland: We will take an exception Your Honor.

Q. What were those conditions?

A. At a depth below the surface of three feet or approximately three feet, the bottom of the pit was floored over completely with a layer of railroad ties, which had been assembled uniformly and adjacent to one another as if constituting a platform or table.

Mr. Sutherland: I submit that he is now going into pure speculation, as if, assembled for the purpose of making a platform for something. Now, Your Honor, isn't he a mile away from his subject?

The Master: Judge Sutherland this is not being tried before a jury.

Mr. Sutherland: I submit that he ought not to be allowed to testify what was in the minds of the people who put this material there. I take an exception to your allowing him to tell what was in the mind of the people who laid that material.

A. The ties were assembled in such a manner as to indicate their artificial placing rather than a haphazard placing by any natrual process. They were laid down uniformly as to both grade and contact with one another.

The Master: Did it appear to you that the railroad ties had grown there?

A. No they were distinctly railroad ties. They were not floating [fol. 447] logs or trees but distinctively railroad ties. Furthermore in conjunction with my other analyses, this three feet of material that covered the ties was more or less a uniform deposit of yellow loamy sand which occurs in general in most of the pits as the top surface area, the top elevation of which was very uniform in position, horizontal plane. It contained frequently a foreign substance such as pieces of brick, small pieces of wood and small tufts of peat and grass and had all of the characteristics which are customary in artificially filled bank.

Q. What was the level at which the deposit of these ties appeared?

A. Substantially grade 247. That level 247 refers to the top of the tie or the botom of the pit.

Q. And below that is the thickness of the tie whatever it was?
A. Yes.
Q. About how thick was the tie?
A. It was not disclosed, that is, it was not possible to excavate anywhere between the ties; they were right up close together, so that without cutting them out, it was not possible to get through them, and that was not done.
Q. Whether or not 6 or 8 inches would be a reasonable allowance for the thickness of the railroad tie?
A. Somewhere in that vicinity, yes.
Q. In connection with these observations, did Mr. Ferguson prepare elevations disclosing the nature of the material at the north and south ends of the pit as observed by you?
A. He did.
[fol. 448] Q. Did you afterwards verify those sheets with Mr. Ferguson and with your observation?
A. I did.
Q. Is that the sheet in question which refers to trench No. 14?
A. Yes, I should say it was.
Q. Does it show correctly the materials as you observe in pit 14?
A. It does.

Mr. Abbot: I will offer that sheet in evidence. Paper last above referred to received in evidence and marked Plaintiff's Exhibit 8.

Q. Whether or not you determined that the material shown in yellow on that sheet was artificially deposited?
A. That was my impression.

Mr. Sutherland: I make the same objection as above stated and take an exception.

Q. In this connection, did you observe the color of the lake sand on the beach?
A. Yes.
Q. What was the color?
A. It was a gray blending somewhat toward a brown.
Q. Whether or not the material found in this pit above the railroad ties was lake sand?

Mr. Sutherland: I object to that. He can only tell the appearance. He can testify to how it looks on top of the beach but not how it appears after being buried for years.

Objection overruled. Exception.

[fol. 448a] A. It was an entirely different character of material.
Q. Now, taking pit 19, which is somewhat north of pit 14 and just west of the jetty, what did you find in that pit?
A. The top 1.4 feet in depth consisted of this same yellow loamy sand as described in *in* pit 14. Below that for a depth of something less than 2 feet there was a miscellaneous fill containing much ashes, refuse and foreign matter of one kind and another. Below

that depth that is elevation 247.6, was a gray sand resembling the character and composition of the sand on the beach. Immediately below that, there was a layer three-tenths of a foot thick which consisted of a mixture of sand and mud, and below this to the bottom of the pit, was a fine gray sand somewhat finer than the beach sand.

Q. Now that was at the north end of the pit, was it not?

A. I think I ought to say perhaps that I took my elevations almost entirely opposite the stake, the surface stake, which was driven to give the surface elevation, and in general, those were in the middle of the pit, and my elevations may not correspond exactly within a few tenths of the end of the pit, but should represent an average at least of the elevations.

The Master: What was the average depth below the surface of these pits?

A. It depended on where we encountered the water, some were somewhat slighter and some were deepr, but in gneral, four and a [fol. 449] half to five feet.

The Master: From the ground above to the bottom of the pit?

A Yes, except where we found these ties.

Mr. Abott:

Q Whether or not the exceptions which you have stated were caused where ties or other artificial obstructions apparently prevented your going to that depth?

A. Yes there were four or five pits where the excavators found it impossible to go down through on account of obstructions.

Q. Whether or not these pits in general were carried to the point at which water showed more or less in the bottom?

A. Yes, with a few exceptions, all of them were carried down until the ground water tended to undermine the banks and there the excavation was stopped.

Q. I show you a sheet representing the materials in trench No. 19 which sheet was prepared by Mr. Ferguson. Did you verify that sheet with Mr. Ferguson in connection with your observation?

A. I went over all the sheets with him and verified the conditions as he found them.

Q. Whether or not that correctly shows the materials observed in trench 19 as you observed them?

A. Substantially yes, my elevations being taken in the middle and these at each end, there is a slight variation in tenths, but substantially that is the stratification as we found them.

Mr. Abbot: I will offer that sheet in evidence.

[fol. 450] Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 9.

Q. Whether or not the material colored yellow upon this sheet, representing trench 19, was determined by you to be artificially deposited?

A. That was my impression, yes.

Q. What is the line of division between this material colored yellow determined by you to be artificial fill, and the material which you consider to be deposited by natural causes?

A. The line between the yellow and the gray.

Q. At what level?

A. The depth of 247.6, that is substantially shown on the northerly end of the pit.

Q. You have used the figures 247.6, to what do those figures refer?

A. They refer to an established government datum. Just what that is, I cannot tell, as I haven't any personal knowledge, but it is an established government datum from which the Army engineers reckon their water levels on the lake and I have no knowledge, except that these surface elevations were given to me by Mr. Ferguson as having been established for him or by him.

Q. Whether or not you were informed by Mr. Ferguson that these levels of the lake which he gave were referring to the government datum of the level of Lake Ontario?

A. Yes, that is my understanding.

Q. Whether or not that datum is the mean sea level?

[fol. 451] A. Well I don't know but I assume that is approximately so, as to the variation, I think, between Lake Ontario and the sea level.

Q. And the figures 247.6 and so forth then represent the heighth in feet above the Government datum or whatever that is?

A. Above their zero datum, yes.

Q. Whether or not the material shown in this pit above level 246—247.6, up to the top of the pit, was determined by you to be artificial deposit?

The Master: Ask the witness what is shown above 247.6.

Q. Very well, what is shown above level 247.6?

The Master: What is the material?

A. In this particular pit, it is partly loamy yellow sand and partly a miscellaneous fill of plaster and cinders and other foreign substance.

Q. Now turning to pit No. 13, which is just south of Beach Avenue and slightly west of pits 14 and 19, will you state what materials you found in that pit?

Mr. Sutherland: That is outside of the area that is involved in this action That is, it is outside of the land sued for by Massachusetts, is it not?

The Master: I think it is outside of the land covered by the condemnation proceedings, but it may be material as showing the condition of that entire section

A. It consisted for the first three and two tenths feet from the [fol. 452] surface of a yellow loamy clay fill, that is, instead of being loamy sand, there was a larger proportion of clay mixed with it, so that it partakes more of the nature of a clay than a sandy material.

Mr. Sutherland: I object to the statement that it was a fill and move to strike it out, on all the grounds stated when my objection was made and take an exception.

(The witness, continuing:) In my impression it was a fill. Below elevation 247 there was a six inch layer of peat resembling an old swamp surface that is, there was grass roots and chips matted together similar to what is found in existing swamp surface.

The Master: What was the distance down you found this peat?

A. The top of it was 3.2 feet below the surface.

Mr Abbot: And at level 247 I think you said?

A. Yes, the surface at level 247.

Q. Whether or not that sheet correctly represents according to your observations the material found in this pit?

A. It does so far as I have described them. I find that I have no record of the material below the layer of peat and organic material, although it was shown on this sketch. My recollection is that generally speaking, that that is true everywhere that some form of gray [fol. 453] sand or gravel existed under the peat deposits.

Q Whether or not this gray sand and gravel, as you observed it, was substantially similar to the Lake sand as you observed it?

A. It was the same general character in all cases, although it varied; sometimes being fine, sometimes coarse, sometimes containing gravel, sometimes relatively free from gravel. In some cases the stones were pebbles in the gravel and sometimes they were comparatively small, but generally speaking the material resembles in all respects the beach sand.

Q. At what point in trench No. 13 did you fix the level between material naturally deposited and material artificially deposited?

Mr. Sutherland: I object on the same grounds stated before.

The Master (to the witness): The question is at what point in this particular pit did you find the line between the material that in your opinion seemed to be naturally deposited and that which you thought or believed to be artificially deposited; that is the question as I understand it?

Mr. Abbot: Yes.

A. At the top of the old marsh surface or elevation 247.

Q. From that point to the top of the pit was what you determined to be artificial fill?

[fol. 454] A. That was my impression.

Q. What was the thickness of this artificial fill?

A. 3.2 feet.

Mr. Abbot: I offer that sheet in evidence. Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 10.

The Master: The thickness was 3 and how many tenths?

A. 3.2.

The Master: And that consisted of loamy sand mixed with clay?

A. Yes.

The Master: A sandy clay?

A. Yes, it was a mixture of the loamy sand with more or less clay intermingled with it.

The Master: Was that substance materially different from the soil beneath the surface generally found along the lake shore?

A. You mean in this same elevation?

The Master: In this same general locality?

A. Not materially different. It was only one of degree. It had simply more of clay. It resembled more of clay than sand. The loamy sand tends more to a clay.

The Master: That is the character of the subsoil in this entire locality, isn't it?

A. Yes, as I observed it.

Mr. Abbot:

Q. Whether or not this material above the surface differed in color and otherwise from the material immediately beneath it.

[fol. 455] A. Oh, yes, there was a marked difference in color between the top deposit and the material immediately underneath. One was yellow and the other black.

Q. And whether or not below the black this coarse sand and gravel was of a different color from the loamy sand mixed with clay above 247?

A. Yes, in every instance there was a marked distinction in color between the two layers of sand. The bottom sand was a gray sand, sometimes distinctively a gray sand, and sometimes tending towards a brownish gray, but always in marked contrast with the top material, which was yellow.

Q. Whether or not this top material above 247 was in any respect lake sand?

A. I should say no, quite definitely.

Q. When you spoke of the character of the sub-soil in answer to the Master's question, did you refer to the soil of the upland outside this property as distinguished from the material that you found at the bottom of the pits?

A. I referred to the soil of the upland, yes.

The Master: Including that which was covered by these pits?

A. Yes.

Mr. Abbot:

Q. Whether or not this material which you have referred to as distributed over the entire surface of the premises in dispute is the material which you have previously described as artificial fill?

Mr. Sutherland: I object to that. Maybe I don't understand it. [fol. 456] I insist that the witness has not yet stated that the whole surface of this whole area in dispute is artificial.

The Master: I don't understand that he made any such statement, I asked if this material which he described is to be found generally in this whole section covered by these pits, whether that was artificial

or natural, and he said it was. Now, Mr. Abbot asked the witness to say whether or not this material he has been describing is of the character of the material which in his judgment has been put in there artificially. It leaves entirely open the point which you are making.

Mr. Sutherland: I may have misapprehended your Honor's inquiry. Did Your Honor ask the witness whether over all these pits, over this whole area, there was what he called artificial fill?

The Master: No I did not ask him that question. I asked him to say whether or not this material which he thinks was put in there artificially is of the character generally to be found in this area, the area covered by this proceeding, or whether it was brought here from across the lake in his judgment or whether it came from some other state, or whether or not it was the same sort of subsoil that is to be [fol. 457] found generally in this locality and he answered that it was.

The Witness: Your Honor, I would like to correct that answer to this extent, and say that we made no examinations by pits on the beach itself, that is, beyond the wall which separates the grass plot from the sand beach. There was no evidence of this yellow material existing on the beach itself, but only in the pits, which were all to the south of the supporting wall and the grass plots, the surface of the beach itself appears to be of a gray sand which we find below the level.

Q. Whether or not the yellow material or loamy sand and sandy clay which you found in pit 13 was substantially similar to the material which you determined to be artificial in pits 14 and 19?

A. It was substantially the same with a slight variation, due to a little higher clay content.

Q. Now taking pit 7, which is the first pit north of Beach Avenue, and substantially in a northerly line from pit No. 13, what do you find in that pit?

A. I found the first 2.6 feet, that is from the surface down to elevation 247.4 consisted of this same yellow loamy sand material. Between the latter elevation 247.4 and 246.9, that is a distance of 6 inches, was a streak of mud deposit, that is ordinary black silt, a sedimentary deposit; and below that elevation to the bottom of the pit, was a fine gray sand.

[fol. 458] Q. This yellow loamy sand material to which you have referred, whether or not that was substantially similar to the yellow loamy sand that you found in pits 14 and 19, which you determined to be artificial?

A. Generally speaking, yes.

Mr. Sutherland: That is all subject to our objection and exception, so that we won't have to repeat it, Your Honor.

The Master: Yes.

Q. What was the thickness of this material from the surface down?

A. 2.6 feet.

The Master: That is to say 2.6 feet from the surface, down below what you call the top?

A. Yes from the surface down, I have disregarded the top soil in general. It varied in some cases from a few inches of good loam to something which differed very slightly from the yellow sand itself. I neglected the top layer surface in all these measurements.

Mr. Sutherland: Have you got your plat for pit No. 7 in evidence?

Mr. Abbot: I am going to offer that in a moment Judge.

Q. Now take trench No. 18 which is in a substantially northerly direction from pit No. 7, what did you find in pit No. 18?

A. I found this same yellow loamy sand from the surface to a [fol 459] depth of 2.8 feet, in other words to elevation 247.7. Below that was a layer .4 of a foot in thickness of a mixture of black silt and sand, and below that a gray sand.

The Master: What was the thickness of that black silt?

A Four tenths of a foot.

Q. Then the thickness of the material which you determined to be artificial, was what?

A. 2.8 feet.

Mr. Sutherland: That stopped at level 247.7 did it?

A. 247.7 yes.

Q. Does that sheet correctly show the conditions, in trench No. 18 as you observe them?

A. Yes it does.

Q. I notice that on one end of this trench a four inch tile drain is shown and at that end the trench was not carried below the tile drain, which appears at apparently 246.7?

A. I recall such a condition. I haven't noted it on my notes.

Q. I beg your pardon. I meant not 246.7, I meant 247.6, I reversed the figures. Have I got that right?

Q. Yes that is right.

Mr. Abbot: I offer that sheet in evidence. Paper last above referred to, received and marked Plaintiff's Exhibit 12 (Exhibit 11 to be offered later.)

[fol. 460] Q. Taking trench No. 17, which is slightly north of trench No. 18, what did you find in that pit?

A. A depth of 2.2 feet of the same yellow loamy sand, down to 248.3; below that a layer of coarse, gray sand extending down to 246.8 or in other words, a foot and a half. Below that, a layer four tenths of an inch thick, consisting of a mixture of sand and silt, and below that again, fine gray sand.

Q. Does that correctly portray conditions as you observed them in trench 17?

A. I should say so, yes.

Q. What was the thickness of the material which you determined to be artificial, at this point?

A. 2.2 feet.

Mr. Abbot: I offer this sheet in evidence.

Paper last above referred, received and marked Plaintiff's Exhibit 13.

Q. I show you a sheet purporting to show the material in trench No. 7 and ask you whether that correctly represents what was found?

A. It does, so far as the south end of it is concerned, yes. I think I have already stated that my measurements were taken at the middle of the pit, opposite the grade stake as given, and may not necessarily correspond with either end of the pit, but they in general represent the average condition.

Mr. Abbot: I offer this sheet in evidence to be marked Exhibit 11. This refers to trench No. 7.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 11.

[fol. 461] Q. Now taking pit 16, which is just north of pit 17 and 18, what did you find there?

A. I found there a reddish brown material that I assumed to be filling 2 feet in depth, or extending from the surface to a depth of 248.8; below that a gray sand, resembling the beach sand, of medium texture, down to elevation 245.8, and below that another gray sand, somewhat finer in texture.

Q. Whether or not that sheet of trench No. 16, correctly accords with the conditions as you found them?

A. It does, except that I find nothing on my notes with reference to these streaks of organic matter at substantially 247.5.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and Marked Plaintiff's Exhibit 14.

Q. Now taking pit No. 15, which is next north from pits 18 17, and 16?

A. I found 2.6 feet of yellow loamy sand extending from the surface down to elevation 247.9; below that for a distance of nine tenths of a foot, or in other words down to elevation 247, a gray sand resembling beach sand. Immediately below elevation 247, a streak of mud four tenths of a foot in thickness, and below that again, a fine gray sand.

Q. Does that substantially correspond with the observations on this sheet?

A. Substantially so, yes.

[fol. 462] Mr. Abbot: I offer this sheet in evidence.

Paper last above referred to, received in evidence, and marked Plaintiff's Exhibit 15.

Q. What was the thickness of the material, which you determined to be artificial deposit, in trench No. 15?

A. 2.6 feet.

Q. Now taking trench No. 3, which is just west of the line of pits 7, 18, 17 and 16, what did you find in that pit?

A. Yellow loamy sand from the surface for a depth of 2 feet or to elevation 248.6; below that, gray sand and gravel resembling the beach sand, down to 247.6, then a very thin streak of mud, underlaid in turn by fine gray sand.

Q. Did you determine any portion of the material in this pit was artificially placed?

A. Well I applied the same reasoning to the yellow loamy sand as in all the other pits.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 16.

Q. Now taking trench No. 12, which is somewhat west of the line of pits 7, 18, 17, 16, and 15, and close to the boundary of Beach Avenue, I will ask you what you found in pit No. 12?

A. I found a miscellaneous assortment of what apparently seemed to be filling from the surface down to 248.6, a depth of 1.7 feet; below that was a deposit of this same yellow loamy sand down [fol. 463] to 246.6 elevation; below that, a layer approximately a foot thick of old marsh surface, a mixture of sand, mud, roots and organic material.

Q. Does that sheet correctly describe conditions as you observe them?

A. Substantially so, yes.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 17.

Q. Did you determine any portion of the material in this pit, to have been artificially deposited?

Mr. Sutherland: The same objection.

Overruled. Exception.

A. Yes, I applied that reasoning to everything above elevation 246.6, which is the surface of the old marsh.

Q. Now taking pit No. 6, which is slightly north and perhaps a little bit east of pit No. 12?

A. I find there four feet of yellow loamy sand material similar to the general top stratum that extended down to elevation 247; below that there was foot of material resembling an old marsh surface, a mixture of sand, roots, mud, and other organic material.

Q. Does that sheet correctly portray the conditions as you observe them?

A. Substantially so. This goes into a little finer detail, but the [fol. 464] general arrangement is substantially the same as I described it.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 18.

Q. Now taking pit No. 2, which is somewhat north and west of pits, No. 12 and 6, what did you find in trench No. 2.

A. I found 2 feet of yellow loamy sand extending from the surface down to 248.8; below that a six inch layer of a clay sand; below 248.3 and extending down to 247.2 a distance of 1.1 feet, gray sand and gravel, and below that down to 246.3 a medium gray sand and gravel.

The Master: And if you had gone farther still, you would have found water?

A. In all of these pits, water was encountered at the bottom of the pit.

Mr. Abbot:

Q. Does that correctly show the condition in pit No. 2, that sheet?

A. In our elevation I have tenths, the general arrangement is as I have described it. The yellow sand extending in this case to 248.4 instead of 248.8, as I recorded it, in other words there is a discrepancy there of a few tenths between my measurements and this plat.

Q. In that pit did you find any material which you determined to be artificial deposit?

A. I assumed in my judgment that everything above elevation 248.3 was artificial deposit.

[fol. 465] Q. Now returning for a moment to trench No. 6, did you in that pit determine that any material was artificial deposit?

A. Yes, everything above 247.

Q. What was the thickness of that material?

A. 4 feet.

Q. What was the thickness of the material, of the artificial material, in trench No. 2?

A. 3 and one half feet.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 19.

Q. Now taking trench No. 11, which is just north of Beach Avenue, and somewhat west of the pits already considered, what did you find in that pit?

A. I found a condition there similar to the condition in pit No. 14, that is, the bottom of the pit was floored over with ties, closely laid and level. The top elevation of the ties being 248, a distance

of 2 and one half feet below the surface, which 2 and one half feet was composed of this yellow loamy sand.

Q. Whether or not the ties in this case prevented your carrying this trench to water as in pit No. 14?

A. Yes that is as far as the pit was excavated.

Q. What do you say was the thickness of the artificial material so far as this excavation enabled you to discover it?

A. Two and one half feet.

Q. Does that refer to the top of the tie?

A. Yes, to the top of the tie. Of course the ties in my judgment [fol. 466] would necessarily be artificially placed also, so that might also be included, it would make a depth of 3 feet.

Q. Below that you were unable to determine because of the ties?

A. Below that, we could not tell in this pit what existed there.

Q. Does this sheet show the condition as you observed it in trench No. 11?

A. Substantially so, yes.

Mr. Abbot: I offer this sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit No. 20.

The Witness: There is a difference in the two sides there.

The Master: Do you mean, Mr. Gow, that but for the north end and the south end, this drawing represents substantially conditions as you found them in pit No. 11?

A. No I mean that my measurement is taken in practically every instance about opposite the center of the pit, because that is where the elevation stake was placed, and my measurements would not necessarily correspond with either end, but my answer is that substantially that arrangement checks up with my notes. The surface in this case is down at 250.6 whereas my elevation is given at 250.3, so there is a difference of three tenths in the elevation there; that would be a matter of 4 inches. My surface is 250 and one half. [fol. 467] I give the top of the ties at 248. That happens to correspond with the southern end; the northerly end of the pit shows the top of the ties some six inches higher at that point, so that apparently in taking the data for laying out these plats the dimensions were taken at each end of the pit instead of one central measurement. With that exception, that is what I mean by substantially in accordance with my notes. The long way of the pit was at right angles with the beach and the ties went across the pit. The ties run east and west and the pits run north and south.

Q. Then when you say that your observation substantially accords with the sheets which I have shown you, what you mean is that your observation represents a fair average of the measurement at the two ends?

A. I mean any variation is such as might be expected in two observers taking measurements under different conditions depending upon the precise point at which he made his measurement in the pit.

Q. Now taking trench No. 5, which is substantially north of pit No. 11?

A. I found 2.9 feet of yellow, loamy sand from the surface down to 247.4; below that a layer four-tenths of a foot thick, consi-ting of a mixture of sand and silt, and below that, coarse gray sand and gravel.

The Master: How deep was this mixture of silt and mud?

A. That is only a little streak, four-tenths of a foot, that is about 5 inches thick.

[fol. 468] The Master: That is above the gray sand?

A. Yes.

The Master: Resting on the gray sand?

A. Yes.

The Master: This mud and silt, about half a foot thick, rested immediately upon the gray sand?

A. Yes.

Q. And this gray sand is the sand that you say is similar to the lake sand?

A. Yes, that is right. I find also in pit No. 5 I had a note that the loamy fill has much foreign substance in it. I do not recall it particularly, but I do remember that several of the pits showed a considerable amount of foreign substance in the loamy sand.

Q. And by foreign substance, do you mean some material plainly artificial, such as a brick or bottle, or something of that kind?

A. Yes, I mean some physical substance, other than the general material, wood or mud, tufts of roots or something of that character.

Q. Does that sheet substantially show conditions as you observed them?

A. Substantially so, yes.

Mr. Abbot: I offer the sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 21.

Q. Did you determine any portion of the material in this pit to be artificial?

A. Well, in my judgment, everything above the material, the sand and silt, at elevation 247.4, seemed to be of artificial origin.

[fol. 469] Q. What was the thickness of that material?

A. 2.9 feet.

Q. Now taking pit No. 24, what did you find there?

A. 24, I found a deposit of yellow, loamy sand which extended down from the surface to elevation 247.5, or a total depth of 2.7 feet; below that a thin layer, three-tenths of a foot thick, that is about 4 inches, or a litle less, of a mixture of sand and silt; immediately below that gray sand with some vegetable matter mixed with it, to the bottom of the pit.

Q. Does that show with substantial correctness, the conditions as you observed them, in pit No. 24?

A. Yes, substantially so.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 22.

Q. Did you determine any portion of the material in this pit to have been artificially deposited?

Mr. Sutherland: This is all under our general objection and exception.

A. Yes everything above elevation above 247.5.
Q. What was the thickness of this artificial material?
A. 2.7 feet.
Q. Now taking trench No. 23, which lies just north of trench No. 24, what did you find there?
A. A deposit of this same yellow, loamy sand extending down [fol. 470] to an average elevation of 248.2. I find that I have noted here in this pit, there was a marked difference between the two ends of the pit with respect to the depth of this material, being elevation 248 on one end and 248.7 on the other end. At the point where I measured it, 248.2; immediately below that was a gray sand of medium texture.
Q. Does that sheet show the conditions substantially as you observed them?
A. Yes, substantially so.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 23.

Q. Did you determine any of the material in this pit to have been artificially deposited?
A. Yes, it was my judgment that everything above 248.2 or a total depth of 2.8 feet, was artificially deposited.

Mr. Sutherland: That is at the point where he took his measurement. He does not mean at the point 248.7 there is any artificial fill there. He said everything above 248.2 is artificial fill, but he said at one end the yellow only went down to 248.7. Now at that point I understand, the witness would mean that there was nothing below 248.7 which was artificial fill at that end of the pit. There is no use of cross-examining on that subject.

[fol. 471] Q. To clear up this matter, Mr. Gow, you have stated that you have observed a marked difference in level, between the point at which the yellow loamy sand divided from the grayish at the two ends of the pit?
A. Yes.
Q. And in testifying as to the point at which you placed the division line between artificial material and natural material, you placed it at the division line between that gray sand and the yellow loamy sand?

A. Yes my 248.2 is substantially an average between the other two, and I mean at the point where I took my measurements, there was 2.8 feet of yellow, loamy sand which would be more at one end and less at the other end of the pit.

Q. Now taking trench No. 22, which is north of trench 23?

A. I found 2.2 feet of yellow loamy sand and immediately below that, coarse gray sand and gravel, resembling beach gravel. In other words the yellow, loamy sand extended down from the surface of 2.2 feet to elevation 249. Above that I assumed to be fill to the best of my judgment and below it material deposited by natural forces.

Q. I show you this sheet and ask you whether that is substantially correct as you observe the conditions?

A. Substantially so, yes; there again is a slight variation between the two ends and my figure happens to be approximately an average between the two.

[fol. 472] Q. Then you intend to describe as the division line between the artificial and natural material, that division line where the yellow loamy sand divides from the gray sand which you have described?

A. Yes.

The Master: With respect to this particular exhibit?

Mr. Abbot: Yes with respect to this particular exhibit.

Mr. Abbot: I offer this sheet in evidence.

Paper last above referred to received in evidence and marked Plaintiff's Exhibit 24.

Q. Now taking trench No. 21?

A. 3.1 feet of yellow sand and clay fill, extending down to elevation 248. Below that a gray sand resembling beach sand, extending down to 247.2, and immediately below that a layer of three tenths of a foot thick, or about three and one half inches, consisting of a mixture of silt and sand and below that again a fine gray sand.

The Master: This mixture of silt and sand was what you call organic material at various times?

A. Yes the silt is organic, it is mud which is carried in suspension in the water and deposited by sedimentary action.

Q. This sheet shows the condition in trench No. 21 as you observe them?

A. Yes almost precisely.

[fol. 473] Q. What do you say was the thickness of the material which you determined to be artificial deposit?

A. 3.1 feet.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to received in evidence and marked Plaintiff's Exhibit 25.

Q. What did you find in pit No. 20, which lies just north of pits No. 22 and 21?

A. I found there 2.9 feet of yellow sand with some gravel, down to 247.5. At 247.5 there the bottom of the pit was again floored over with railroad ties, making a solid flooring or covering that prevented any further exploration and I assumed that the entire layer of yellow sand and gravel above the ties, or in other words, a total depth of 2.9 feet had been artificially placed by some means.

Q. Does that sheet correctly show the conditions ad you observed them?

A. Yes that is substantially correct.

Mr. Abbot: I offer that sheet in evidence.

Paper last above referred to, received in evidence and marked Plaintiff's Exhibit 26.

Q. This pit did not go to water as I understand?

A. My recollection is that it did not, no sir.

Q. Whether or not the other pits as to which you have testified went to water, except the ones which you have testified were floored with ties?

A. That is correct.

Q. Have you any note as to arrangement of the ties in this pit No. 20?

A. I haven't any record in the notes, but I recall that pit quite [fol. 474] distinctly. Some of the ties were banked up on an angle, as if it were a curve in the railroad road bed, and it had been banked up to prevent the possible overturning of the cars.

Mr. Sutherland: Your Honor, a communication from Mr. Getman was received by me this morning, which I would like to hand to Your Honor. He thinks perhaps, something should go into the record in regard to his position, and I will hand the letter to you, and the annexed statement which he would like to go into the record.

The Master: I will look at it during the noon hour.

[fol. 475] Colloquy Between Master and Counsel

Mr. George Decker: Your honor, may I have the privilege of introducing Mr. William C. Hoag, President, and Mr. Walter Kennedy, Clerk of the Seneca Nation of Indians, who have a matter which they would like to call your attention to now upon the subject of this litigation.

The Master: Very well.

Mr. Kennedy: If your honor please, as a representative of the Seneca Nation of Indians, and in behalf of the Seneca Nation of Indians, I appear here and I would like to call your honor's attention to a matter which I desire to present to you at the present time, and which I have put in writing.

(Mr. Kennedy hands the paper to the Master.)

The Master: For the benefit of counsel I will read it. It is addressed to me.

The Council of the Seneca Nation, having learned that certain lands under the waters of Lake Ontario near the mouth of the Genesee River, have been filled in artificially and appropriated by certain private interests, and that ownership of such made lands is the subject of dispute in this court in this proceeding to which the Seneca Nation is not a party, hereby gives notice to all whom it may concern, that all such lands so made are within the domain of the Seneca Nation which has never made any cession thereof, nor authorized such reclamation, and, in behalf of the Seneca Nation, they protest against all proceedings had in respect thereto, or in respect to the title thereto taken without consent of the Seneca Nation, and they call upon the Supreme Court of the United States of America to protect the Seneca Nation in all its rights and interests [fol. 476] under the pledge of the Treaties of Fort Stanwix, Fort Harmer and Canandaigua, and we respectfully ask that this notice be placed upon the records in this case.

Dated Rochester, N. Y., October 15th, 1923.

William C. Hoag, President of Seneca Nation. Walter Kennedy, Clerk of Seneca Nation.

That will be spread upon the record and due notice taken.

Mr. Sutherland: Your honor, another matter should be referred to, I think, before this case proceeds any further. There has appeared at various times in the public press of Rochester a statement purporting to come from some authorized source to the effect that if the Commonwealth of Massachusetts succeed in establishing its claim to the land in dispute in this action the Commonwealth will present the land to the City of Rochester as a gift. I am advised by the learned and courteous gentlemen who represent the Commonwealth of Massachusetts in this case that no such statement has ever been authorized by him or to his knowledge no such statement has ever been made by any official of the Commonwealth of Massachusetts. I wish to say on behalf of the counsel who represent the defendants that were in possession of this land at the time it was taken over by the City of Rochester for park purposes, that none of us have made or authorized any such statement. It would seem as if the state-[fol. 477] ment is prejudicial to the orderely and decorous conduct of this case, and I think counsel are in order when they call the attention of the court to the fact that this statement is being made at various times. It has appeared again and again, as if it had a substantial foundation. It is a matter of great regret to us, and I call it to your honor's attention at this time, hoping that the effect of our protest will be that no such propaganda will be issued from any source while this case is going on.

The Master: I think it is entirely proper for you to call attention to the matter, not because there is any issue in the case that is immediately affected by it, but because it would seem natural and ap-

propriate that if the Commonwealth of Massachusetts had designed to present this property to the City of Rochester in the event that the title should be in the Commonwealth of Massachusetts a great deal of time might well have been saved by the Commonwealth of Massachusetts simply giving to the City of Rochester a quit claim deed of any interest that it might have, and then the other parties in interest would fight out the controversy without invoking the time and jurisdiction of the Supreme Court.

Mr. Abbot: I should like to add to Judge Sutherland's statement that so far as I am aware, and I don't think I could be in error, this case is brought by the Commonwealth of Massachusetts in its own right and for its own benefit, and for the benefit of no other person whatsoever. I should also like to add that in case the title of the [fol. 478] Commonwealth of Massachusetts should be established, as I understand it, the disposition of this land would lie with the legislature of Massachusetts, and I know of no one who could make an authoritative bargain which would bind that body to do anything in advance.

Mr. Oviatt: Well, if it is in order, I might just as well add this: I have been retained to assist in the conduct of this litigation by the Commonwealth of Massachusetts. I am not familiar with any of their intents and purposes. I disclaim any knowledge on that subject. I have never discussed their plans and purposes with any living soul, not even with my associate, Mr. Abbot, and I have never made any statement at all in the territory which is now being discussed. My attitude in this case has been, so far as the nonjudicial proceeding is concerned, one of complete, absolute, infinite silence.

The Master: Mr. Gow, we are ready to proceed.

Charles R. Gow was thereupon recalled to the stand for further examination and testified as follows:

Direct examination.

By Mr. Abbot:

Q. Mr. Gow, — whether or not your investigations in the course of your professional work have included exploration of beach sites and marshes with regard to the materials contained in them?

A. Yes, sir, a great many times.

Q. What was the nature of those investigations?

A. Well, many of them have been quite similiar in character to this one, that is, a proposed location for a building or structure adjacent to the coast line, and the necessity of determining the [fol. 478a] character and formation of the soil, including the amount of artificial place and natural place.

Q. Now, in your testimony this morning you have from time to time said that you assumed that certain material was naturally placed

or was artificially placed; what did you mean by the word, "assumed"?

A. Well, I mean that's my best professional judgment in the matter.

Q. Have you any interest in this litigation?

A. None whatever.

Q. Now, taking up Pit number 10, which lies just north of Beach Avenue and somewhat east of Lake Avenue, what did your investigations disclose with regard to Pit 10?

A. I found there a total depth of 4.1 feet of gravel and loamy sand mixed, extending from the surface down to elevation 247, at which point was encountered an old swamp surface consisting of peat and mud. There were also some railroad ties across the bottom of the pit, not a continuous platform as in some of the other instances noted, but two individual ties across the pit with their top at elevation 247.

Q. Does that sheet correctly represent the conditions as you found them in Trench number 10 (showing sheet to the witness)?

A. Yes, substantially so. This sketch refers to the material at elevation 247 as "sand and organic," whereas I have called it peat and mud. I have assumed the same materials referred to.

Q. What was the thickness of the materials which in this pit you determined to be artificially filled in?

A. Apparently at the time I examined it the peat and mud had not been penetrated, at all events my notes show nothing below that [fol. 479] elevation 247 at which the old swamp surface was encountered.

Q. Whether or not the level above this sand and organic or peat and mud, represents the thickness which you determined to have been artificially filled in?

A. It does. 4.1 feet.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's exhibit 27.")

Q. Now, taking Trench #4, which lies north and a little east of Trench #10; what did you find in Trench #4?

A. I found a deposit of the same material, yellow loamy sand, extending from the surface to 247.7, a total of 2.9 feet; below that I found a layer of mud and sand mixture, .4 of a foot in thickness, and immediately below that a deposit of gray sand.

Q. Does that sheet represent the conditions as you observed them with substantial correctness?

A. Substantially so, yes.

Q. Did you determine any portion of this pit to have been artificially filled?

A. The top section there, or 2.9 feet, the portion above the layer of mud and sand.

Q. Referred to by you as loamy sand?

A. Yellow, loamy sand.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's exhibit #28.")

Q. Now, taking Pit #39, which lies slightly north and somewhat west of Pit #4, what did you find in Trench #39?

A. I found a depth of 3.3 feet of yellow loamy sand extending down to elevation 247.5; immediately below that a layer .4 of a foot thick, consisting of a mixture of sand and silt, and immediately un-[fol. 480] der that gray sand resembling the beach sand.

Q. Did you determine that any portion of this pit was artificially filled?

A. Yes; the top 3.3 feet.

Q. The portion referred to by you as yellow loamy sand?

A. Yes.

Q. Does that sheet correctly represent conditions or substantially correctly as you observed them?

A. Substantially, yes, sir.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #29.")

Q. Now, taking Trench 38, which lies substantially directly north of Trench 39; what did you find in Trench 38?

A. A layer of loamy yellow fill extending from the surface down to elevation 249, or a total depth of 1.8 feet; immediately below that gray sand resembling beach sand.

Q. Does that sheet correctly represent it so far as you observed it?

A. Yes, substantially so, except that reference is made in the gray sand here to organic material that apparently didn't impress me as being worth noting so far as its distinction was concerned.

Mr. Sutherland: I would like to ask the witness if he did notice a layer of organic matter overlaid and underlaid with gray sand? I interpolate that.

Witness: I can't recall of course in this particular pit, as to whether I noted it or whether I didn't. I didn't make any record of it.

[fol. 481] Mr. Sutherland: All right.

Q. Did you determine that any portion of that pit was artificially filled?

A. Yes, sir, the top 1.8 feet.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #30.")

Q. Taking now Trench #37, which lies just north of Trench 38, what did you discover in that pit?

A. A depth of 2.5 feet of miscellaneous fill, that is, miscellaneous material which I determined to be filling, extending down to an average of 248.2. I find a note here that the south end was about a foot higher than the north end, that is, the fill extended down to a depth which varied a foot between the two ends, the south end being 248.7, and the north end being 247.7, and below this miscellaneous fill was a deposit of gray sand and gravel similar to that on the beach.

Q. Does that represent the conditions with substantial accuracy as you observed them?

A. Yes. So far as the location of the filling and the gray sand. Here again there is a reference to organic matter which I find I made no mention of in my notes.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #31.")

Q. Now, taking Trench #36, which is approximately north of Trench #37, what did you find in that trench?

A. 1.6 feet of yellow loamy sand extending down from the sur-[fol. 482] face to elevation 249; below that gray sand and gravel resembling that on the beach.

Q. Did you determine that any portion of this pit was artificially filled?

A. Yes, the top 1.6 feet.

Q. Does that sheet correctly represent the conditions as you observed them, that is, with substantial accuracy?

A. Yes, it does.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #32.")

Q. Now, taking Trench #1, which lies almost due east of Trench 36 and at approximately the same distance from Beach Avenue, what did you find in Trench #1?

A. 2 feet of yellow loamy sand extending from the surface down to elevation 248.5; below that gray coarse sand and gravel down to 246.5 where a very thin streak of mud was encountered; and below that again gray coarse sand and gravel.

Q. Did you determine any portion of this pit to have been artificially filled?

A. The top 2 feet.

Q. Referred to by you as yellow loamy sand?

A. Yes.

Q. Does that sheet correctly represent the conditions as you recollect them?

A. That is the general arrangement. There is a slight discrepancy of a few tenths in elevation. Apparently the elevation taken for the surface in this particular instance is .2 less than that given me at

the time; that is, the top surface is indicated here as 250.3, and on my notes is 250.5, but with that exception it corresponds.

[fol. 483] Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #33.")

Q. Now, taking Trench #35, which was substantially north of Trench 36, what did you find in Trench 35?

A. 2.6 feet of miscellaneous filling, that is, filling of miscellaneous character, extending from the surface down to elevation 247.8, and below that point gray sand and gravel.

Q. When you say miscellaneous filling, do you mean that the material so described by you was artificially deposited?

A. Yes, and I mean that it is material of an entirely foreign nature to that usually found in natural formations.

Q. Whether or not in your judgment it was artificially deposited in this pit?

A. That's my judgment yes, sir.

Q. Mr. Gow, I show you this sheet: Does that correctly represent conditions which you observed in Trench #35?

A. Yes, it does substantially.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #34.")

Q. Now, taking Trench #9, which is the first trench on the so-called Bartholomay property, and is just west of Lake Avenue and close to Beach Avenue——

Mr. Moser: Those numbers are reversed on my map. That is #9, that is #8. Now, which is right?

Q. What did you observe with respect to Trench #9?

A. That pit was located in what appeared to be a former excavation. It was back-filled with rocks and stones and other material [fol. 484] that made it impossible to draw any conclusions from it, and I instructed Mr. Ferguson to abandon that pit and I have simply made a note that no deductions were drawn from this pit.

Q. Whether or not you threw out this pit altogether in your consideration?

A. I did, yes.

Q. Now, taking Pit #34, which is somewhat west of pit #9 and near Beach Avenue, what did you find in Pit #34?

A. There was a deposit of clay loam from the surface down to 251.3, a total depth of .9 of a foot; below that and extending down to 249.4 was a deposit of slag fill; below that and extending down to 247.4 a clay loam material which I also judged to be fill, making a total depth of 4.8 feet from the surface down of material that appeared to have been artificially placed, and below that a coarse brown sand and gravel.

Q. Does that sheet correctly represent conditions as you observed them in Trench #34?
A. Yes, that's substantially correct.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #35.")

Q. Now, taking Trench #33, which lies substantially north of #34, what did you find in Trench 33?
A. Starting at the surface there were .9 of a foot of yellow loam; below that a layer again .9 of a foot in thickness of sand and dirt [fol. 485] filling; below that to a further depth of 1.7 feet a deposit of yellow loamy sand extending down to elevation 247.6; below that point gray sand and gravel, making a total material which I determined to be artificial fill of 3½ feet.
Q. That is to say, all substantially above this 247.6?
A. That's right.
Q. Does that sheet correctly represent the conditions?
A. Yes, that's substantially correct.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #36.")

Q. Whether or not you personally examined pits numbers 46, 45, 44 and 43?
A. No, I did not. I examined from one to 39, inclusive, and the others were all excavated subsequent to my last visit and I have not had an opportunity to examine them.
Q. Now, taking trench number 8, which lies somewhat west of the line of pits which we have just referred to, and not far from Beach Avenue, what did you find in trench number 8?
A. From the surface to 247.5, a total depth of 3.4 feet was a deposit of yellow, loamy sand; below this for a further depth of 1.1 feet a layer of rather dirty gray sand; at this elevation 246.4, which was the bottom of the pit when I examined it, there was a layer of large wood chips similar to what might have come from lumbering or the ordinary floatsam that's found on the surface of the lake.
[fol. 486] Q. Whether or not these chips appeared to be more or less decayed?
A. Yes, they were in several stages of decomposition.
Q. Did you determine that any part of that trench was artificially filled?
A. The top 3.4 feet.
Q. That is to say, the portion above what level?
A. 247½.
Q. Does that sheet correctly represent the conditions as you observed them?
A. Substantially so with very slight variations.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #37.")

Q. Now, taking trench number 32, which lies west of trench 8 and close to Beach Avenue, what did you find in trench number 32?

A. A depth of dark, loamy fill .9 of a foot in thickness below the surface, below that yellow, loamy sand down to 248½, a total distance of 3.4 feet from the surface; below that very coarse, gray sand and gravel.

Q. Did you determine that any portion of this pit was artificially filled?

A. The top 3.4 feet.

Q. Does that sheet correctly represent the conditions?

A. Yes, that's substantially correct.

Q. Would you give me the level at which you fix the division line between natural material and artificial fill?

A. 248.5.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit #38.")

[fol. 487] Q. Now, taking trench number 31, which lies somewhat west of trench 32 and substantially at the same distance from Beach Avenue, what did you find in trench number 31?

A. A total depth of 4.6 of miscellaneous fill extending down from the surface to 247.2, and below that dark, gray, coarse sand and gravel.

Q. Did you find in this pit any material which you determined to be artificial deposit?

A. The top 4.6 feet.

Q. What was the level of the division line between the artificial and the natural?

A. 247.2.

Q. Does that sheet correctly represent conditions as you observed them?

A. Well, there appeared to be quite a variation here between the two ends of the pit. 247.2 would represent the level which is shown here at the north end of the pit. That was the measurement that I determined. This also shows on the north end of the pit apparently an indication of some organic matter that is at somewhat higher level which is not noted in my notes. With that exception I think it is substantially correct.

Q. Have you any note as to what lay just below the yellow material or the materials colored yellow on this plan?

A. Dark, gray, coarse sand and gravel, in my notes.

Q. You didn't observe a nine inch timber there?

A. I made no note of it. I have from time to time noted the existence of timbers but apparently didn't in this particular case.

Mr. Sutherland: May I interpolate a question, Mr. Abbot, so we won't have to cross-examine on all of this?

[fol. 488] Mr. Abbot: Certainly.

Mr. Sutherland: Mr. Gow, on the north end of the diagram, representing the trench number 1——

Witness: 31.

Mr. Sutherland: Trench number 31, just above and just below the line indicating level 248 are two bands marked, "sand and organic:" Did you say that you did not observe such layers of sand and organic matter at those points in the north end of trench number 31?

Witness: I didn't say I didn't observe them; I didn't make any note of them.

Mr. Sutherland: You would not call those strata of sand and organic matter artificial fill, would you?

Witness: Well, it would depend upon the conditions under which they occurred. In many cases the yellow sand and the fill was streaked with accidental streakings of other material which gave it the appearance of a band. Some cases the sand was mixed with dirt so as to give it a darker appearance in streaks. It was a question whether to define merely a dirty sand or a distinct layer, a distinct separate deposit of material, but at the point where I took my measurements apparently that streak did not occur.

Mr. Sutherland: Well, where they did occur and have been by someone else delineated on this chart, you don't wish to call those fills of silt laid in and also artificial fill, do you?

[fol. 489] Witness: Well, I haven't attempted to interpret that but only the notes, measurements, I took myself.

Mr. Sutherland: Very good, sir.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to received in evidence and marked, "Plaintiff's Exhibit Number 39.")

Q. Now, taking pit number 30, which lies west of pit 31 and substantially the same distance from Beach Avenue, what did you find in trench number 30?

A. A mixture of black and yellow clay and loam fill extending from the surface down to elevation 248.8, a total distance of 3.1 feet, underlaid with very coarse, gray sand and gravel.

Q. Did you determine that any portion of this pit was artificially filled?

A. The top 3.1 feet.

Q. What was the line between the artificial and natural fill, as you determined it?

A. 248.8.

Q. Does that sheet correctly represent the situation substantially as you observed it?

A. Yes, that's very close to it.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit Number 40.")

Q. Now, taking trench number 28, which lies slightly west of trench 30 and somewhat more distant from Beach Avenue, what did you find in trench number 28?

A. A depth of 3.7 feet of miscellaneous filling, that is, having [fol. 490] some variation in character, down to elevation 247.8; below that clean, gray sand resembling that on the beach.

Q. Did you in this pit determine whether there was any material artificially filled?

A. The top 3.7 feet.

Q. The line of division being what?

A. 247.8.

Q. Does that sheet more or less correctly represent the situation as you observed it?

A. It does in respect to the filing. The chart shows some organic matter in the sand immediately underneath the fill, whereas my notes refer to it as clean sand.

Q. Whether or not that difference might be caused by the fact that you observed the middle of the pit and this chart delineates the two ends?

A. No, I think not; I think more likely it is due to the differentiation in what is dirt and what is dark colored sand. Some of the sands were very dark colored, very dark gray as distinguished from a lighter gray color, and gave the appearance of being full of organic matter.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's exhibit number 41.")

Q. Now, Trench number 29, which lies substantially north of Trench 31 and further out from Beach Avenue than Trench 31?

A. There I found a depth of 1.1 of loam, and underneath that a gray sand and gravel extending down to elevation 247.8, at which level there occurred a deposit .5 of a foot thick, which was a mix- [fol. 491] ture of mud and sand; below that a fine gray sand.

Q. Did you determine that some portion of that pit was artificially filled?

A. Yes; the top 1.1 feet, and 249.3 was the dividing line.

Q. Does that sheet represent the conditions as you observed them with substantial correctness?

A. Yes, sir.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit Number 42."

Q. Now, we come to a group of pits beyond the westerly boundary of the property, 27, 26, 25, 42, 41 and 40: Are there any of those pits which you have not examined?

A. The last three you mentioned, in the forties—40, 41 and 42, I have never had an opportunity to examine.

Mr. Abbot: I may state for the purpose of the record, I think with the consent of counsel, that those pits are all located in the tract which has been referred to in the testimony as Terry Park, lying slightly to the west of the tract in dispute. Is that satisfactory counsel.

Q. What did you find in Trench number 27?

A. First a layer of clay loam, .7 of a foot in thickness, extending down to elevation 249.5. Below that course sand and gravel which I determined to have been filling because it overlaid a layer of yellow clay which was unmistakably filling, a blanket of yellow clay that [fol. 492] had been deposited over the surface at elevation 248, that is to say, the top of this yellow clay blanket was at elevation 248, its bottom was at 247½, and from that point, 247½, to the surface, a total depth of 2.7 feet, I determined to have been placed by artificial means; below this level, that is, below 247½, was coarse gray sand and gravel underlaid in turn by a very coarse drak gray sand and gravel.

Q. Does that sheet correctly delineate Trench number 27 substantially as you observed it?

A. No, it does not. There is quite a variation in our elevations. My surface elevation is 250.2, at all events that was the elevation given to me, and this is drawn as showing the surface at 250.9, .7 of a foot higher. The other elevations are correspondingly higher so that apparently the elevation of that surface stake was changed after I took it. With that exception I think it is substantially the same.

Mr. Abbot: I will offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's exhibit number 43.")

Q. Now, Trench 26.

A. 26 shows .8 of a foot of clay loam overlying coarse sand and gravel, which in turn overlies a grayish brown sand, the whole resting on top of another layer of yellow clay filling of unmistakably filling in character, which exists from 247.6 to 248.3; in other words .7 of a foot of yellow clay filling, a layer or blanket above which were various strata of loam sand and gravel. Below the gray clay fill, that [fol. 493] is below 247.6, was a very coarse dark gray sand and gravel.

Q. Upon what do you base your conclusion that this clay or clayey material which you have referred to as fill or artificial fill, was so deposited? What indicated that to your mind?

[fol. 494] A. Well, it is a very simple matter for one familiar with soils to distinguish a clay fill. It is not always so easy in some other classes of material, but when the clay stratification is broken

up and redeposited it has a distinctively mottled character and unnatural cleavage, which shows unmistakably whether or not it was natural deposit or artificial deposit.

Q. Whether or not you found the indications in this clay that indicate the artificial deposit.

A. Yes, I did.

Q. Does that sheet correctly delineate Trench Number 26 substantially as you observed it?

A. Yes, sir; that's very close to my notation.

Mr. Abbot: I will offer that in evidence..

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit Number 44.")

Q. Now, take Trench Number 25.

A. 25, I found a layer of dark loam .9 of a foot in thickness, overlying a two foot layer of coarse, yellowish brown sand and gravel that extended down to elevation 248. Below that was a mixture of sand, mud and roots, aproximately one foot in thickness, and below that again very coarse dark gray sand and gravel.

Q. In this pit did you determine that any portion of it was artificial?

A. The dark loam, the .9 of a foot on top, I took to be artificial in character.

Q. And all below that natural?

A. Below that I believe was deposited by natural causes, yes, sir.

Q. Did you in considering this pit determine whether or not a certain portion of the material was deposited by different natural forces?

A. Yes, I did.

[fol. 495] Q. What were those forces?

A. Wind and water; that is, the sand and gravel in the upper strata immediately below the loam was stratified in a manner which indicated a wind or dune formation; that is, the stratification was very steep, pitched toward the stream, corresponded in character and material with a similar ridge which is being formed above the surface at this point at the present time due to the wind action.

Q. At what point did you place that division between wind action and between water action?

A. My judgment is that all of the material deposited above elevation 248, which I referred to as a coarse yellowish-brown sand and gravel, was probably in the main deposited by wind dune action, and that the layer of material below 248, of sand, mud and roots, was the ordinary swamp or lake bottom formation; and that the dark coarse gray sand below that had also been deposited at some time by water action.

Q. Does that correctly delineate the conditions in Pit 25 as you observed them?

A. Yes, that's very close to my record.

Mr. Abbot: I'll offer that in evidence.

(Whereupon the sheet referred to was received in evidence and marked, "Plaintiff's Exhibit Number 45.")

Q. Do the pits as to which you have testified, Mr. Gow, cover all of the pits which you have examined both within and without the premises in dispute?

A. I think so.

Q. Were Pits 46, 45, 44 and 43 dug by Mr. Ferguson, at your suggestion?

A. Well, I suggested that he dig pits there; I presume he dug them, yes.

[fol. 496] Q. Did he report the results of his observation to you?

A. Not specifically, no.

Q. Did Mr. Ferguson prepare a cross-section based upon certain of these lines of pits, indicating the division between natural and artificial material?

A. Yes.

Q. Did you examine that cross-section?

A. Yes.

Q. Did you check it up with your observations to determine whether or not it was correct?

A. Yes.

Q. Did you find it correct, according to your observations?

A. Well, we found some errors in the original lay-out and had them corrected.

Q. Is that the diagram to which you just referred, and which you verified with Mr. Ferguson?

A. I believe it is, yes, sir.

Q. These pits, 46, 45, 44 and 43, were not, as I understand, verified by you?

A. No.

Q. So that portion of the diagram is not referred to in your testimony?

A. No.

Mr. Abbot: I offer this diagram in evidence. I may say that I shall put on Mr. Ferguson and General Abbot, who examined both of these pits.

Mr. Sutherland: We object to this on the merits, your Honor; not especially because he hasn't qualified pits 40 to 44, but on the merits. We object to it as incompetent, no sufficient foundation, not predicated upon competent evidence, and incompetent generally.

Mr. Beach: There is a lot on there that hasn't been explained and we don't know anything about it.

[fol. 497] The Master: What do you say, Mr. Beach?

Mr. Beach: There is a lot on there that hasn't been explained, that we don't know anything about what they mean so far as this document is concerned. It says here, "Shepard line," "Finley line," and all these contours that haven't been explained.

The Master: You better put that in, Mr. Abbot, when you put Mr. Ferguson, who made this, on the stand.

Mr. Abbot: Very well. I simply want to have the witness testify that these contours are correctly delineated on the plan. He has checked all those up.

Mr. Sutherland: He has testified that the chart——

The Master (interrupting): This is really nothing but an extension of the conditions as shown by the pits, isn't it?

Mr. Abbot: Precisely that, neither more nor less.

The Master: This is an imaginary picture of the way it looks beneath the ground if all of it had been dug up instead of the pits.

Mr. Moser: That is, if all of it had been dug up and the digging up disclosed these things. That is, he has dug a few pits and this is a guess.

The Master: This is what the rest would be if it was all like the pits; is that it?

Mr. Abbot: Not quite, because your Honor will observe this line of pits here is substantially in line, running north; this line is substantially in line, running north; this line here is substantially in [fol. 498] line, running north; and this line is substantially in line, running north. So this represents four actual cross-sections based on the actual observations in the pits arranged in that way.

The Master: Yes; but it includes cross-sections of territory in which no trenches have been made, does it not?

Mr. Abbot: Simply the distance between one pit and the next pit.

The Master: Yes.

Mr. Abbot: Going north.

The Master: Yes.

Mr. Abbot: We didn't dig a complete trench, an unbroken trench from Beach avenue out to the lake.

The Master: Yes.

Mr. Abbot: But we did place trenches in order in a substantially straight line, and the only gap in it is the gap between one trench and another.

The Master: In other words, this shows what the conditions below the surface are——

Mr. Abbot: Yes.

The Master: If those conditions were all like the samples as indicated in the pits.

Mr. Abbot: Yes, indicated in the pits. Well, let me ask the witness a few questions.

Q. Mr. Gow, you say that you have examined this diagram, this cross-section, and that it correctly represents the conditions as disclosed by these lines of pits which were examined by you. Will you explain the nature of this diagram for the benefit of the Court?

A. The diagram was made at my suggestion in order to relate [fol. 499] the several layers found in the different pits with one another, to see what the general tendency of slope was. Of course, the only absolute information that we have is that disclosed by the individual pits as noted here in each instance, and what is delineated between those pits is an assumption that there is a uniform grade

from one pit to the other of a given layer, and similar layers have been connected up on that assumption. It is possible that there may be some slight variation, but the series of pits, taken in a line, indicate a tendency for the various strata to slope upward or downward, as the case may be, and it was to determine what that would develope that these sketches were prepared in order to show at a glance the probable underground formation along that north and south line.

Q. Now, the section on this diagram called Section A-A, delineates the conditions found by connecting the line of pits——

A. 13 and 15.

Q. 13, 7, 18, 17, 16 and 15, does it not?

A. Yes, sir.

Q. The inner end being Pit 13, and Pit 15 being the last pit nearest the lake; is that correct?

A. On the easterly row of pits, yes, sir.

Q. On the easterly row of pits. Then Section B-B delineates the pits beginning with Pit Number 11, then Pit 5, then Pit 24, Pit 23, Pit 22, Pit 21 and Pit 20?

A. Yes, sir.

Q. Pit 11 being the most shoreward pit, Pit 20 being the nearest pit to the lake.

A. That's right.

Q. Then Section C-C delineates the conditions found by connecting the line of pits numbered 10, 4, 39, 38, 37, 36 and 35?

[fol. 500] A. That is right.

Q. Pit 10 being the nearest shoreward pit, and Pit 35 being the last lakeward pit?

A. Yes, sir.

Q. And on the Section D-D you have examined only pits 34 and 33, those two?

A. Yes, sir.

Q. Being in a further line to be continued, 46, 45, 44 and 43, 34 being the most inward pit?

A. Yes, sir.

Mr. Moser: Let me find out what these lines are. At the bottom of these sections there are dotted lines. What are those lines?

A. That is supposed to be the water level.

Mr. Moser: Then there is a straight line above that?

A. That is 246, elevation.

Mr. Moser: Then the water level is not the same throughout the length of this section?

A. No.

Q. That is, water doesn't always seek its level?

A. Yes, it seeks its level but it doesn't always find it.

Q. Doesn't get it?

A. It is more difficult to drain out of some soils than out of others.

Q. You marked, "Beach avenue," on there; what does that mean?

A. That is where the line crossed Beach avenue.

Q. What does the reference line mean? Is that the north side of Beach avenue?

A. It happens to be in this case, but it means the point to which he referred his measurements.

Q. Is that drop there the reference line of the curb?

[fol. 500a] A. No. It is the reference line from which his measurement is made to locate these pits.

Q. Why is there a drop in that line?

A. That is the cavity of the street surface, down the curb.

Mr. Abbot: I am perfectly willing that the words upon this diagram, "North Line Orginal Lot 20 in 1803," which appear opposite the Section D-D, may be considered to be the equivalent of simply the Shepard line. Now I offer this diagram in evidence.

Mr. Sutherland: We want to save our rights, your Honor, so we repeat the objection and ask it be noted on the record.

The Master: Of course, the value of it has its limitations because it assumes that the entire surface, under surface along the lines projected will disclose the same conditions as were found in the trenches, but with that qualification I think it may go in.

Mr. Sutherland: We take an exception to the ruling, your Honor. This so-called water line, the record should show that that is not to be interpreted by any one as indicating the line of the lake, but as indicating a point where they struck water.

The Master: Oh, yes. It is indicating a point at which water would be struck in going down.

Mr. Sutherland: Yes, that's all.

The Master: Not in going north.

(Whereupon the paper referred to was received in evidence and marked, "Plaintiff's Exhibit 46.")

[fol. 501] Q. Mr. Gow, in your opinion has the number of pits dug on the premises in dispute been sufficient to fairly indicate the nature of the division line between artificial fill and material naturally deposited over the entire surface of the premises?

A. Well, that is my judgment. Of course, a large number of pits would eliminate any possibility of further error, but, in my judgment and examination of this soil, that number of pits I feel gives a representative view of the conditions underlying the surface.

Q. Now, upon this diagram there is a delineation of a blue line delineated, "Water line;" what does that represent at the bottom of each cross-section?

A. Well, that's only an extension of the gray color which is intended to represent the material naturally deposited.

Q. Whether or not it represents the level of the water which was struck in the pits?

A. Well, the dotted line is intended to represent that.

Q. Above that the material delineated gray represents what?

A. Represents the material that I believe to have been deposited there by natural causes.

Q. The material delineated in yellow represents what?
A. Represents the material, in my judgment, that was placed there and formed artificial fill.
Q. And is that true of all four of these cross-sections?
A. So far as my examinations have gone, yes.
Q. And that qualification only extends to the last four pits on [fol. 502] Section D-D?
A. Yes, sir.
Q. Now, upon this diagram, Colonel Gow, whether or not the lowest point of the material *material* appears nearest the shore?
A. Yes, it does in every instance.
Q. Whether or not the material then rises in a gentle slope which rises in a northerly direction toward the lake.

Mr. Moser: What do you mean by the shore? I thought the shore was towards the lake.
Mr. Abbot: No, the inward shore.
Mr. Moser: Well, when you say shore you don't mean shore?
Mr. Abbot: I beg your pardon. I will strike that out.

Q. Whether or not the lowest point at which the natural material appears, and where there is most artificial fill, is at the point in each case closest to Beach avenue.
A. That's true.
Q Whether or not the natural material then rises upon a gentle slope which rises in a northerly direction toward the lake?
A. Well, there is a tendency for the natural material to assume an approximately level elevation until some few hundred feet out from Beach Avenue where it starts to rise to a peak and then drops away again toward the lake.
Q. In other words, the thickness of the material deposited artificially as determined by you is thickest toward Beach avenue?
A. Yes.
Q. And grows thinner as you move out toward the lake?
A. Yes, sir.
[fol. 503] Q. Have you formed any judgment as to the manner in which this natural material was so deposited?
A. Yes, sir.
Q. What is that?

The Master: I don't think you want to put that in quite that way, do you Mr. Abbot? You don't want to ask him if he can guess, do you, the way in which natural deposit got there? Is that what it is going to mean?
Mr. Abbot: Well, I will ask a question or two more in connection with that.

Q. Whether or not, Colonel Gow, you have from time to time had occasion to observe to some extent the behavior of sand and other materials under the action of wind and water?
A. Yes, sir.

The Master: Ask him where he has had that experience.

Q. Where have you had that experience?

A. Around beaches in the eastern part of the country, particularly around the vicinity of Boston Harbor.

Q. Have you had occasion to observe this in connection with your business and your work?

A. Well, it's related—the formation of soils is closely related to my professional work, and it has had an interest for me.

The Master: How has your professional work brought you in touch with the action of wind and water around lake shores?

Witness: The study of the formation of soils adjacent to the tide has presented a great many problems in origin and character which has made it a matter of information to me to observe the formation [fol. 504] of these beach areas. For example, for a great many years I had a cottage at the beach, and have had frequent occasion to watch the formation of bars and filling and recession of the beach areas because of its application to problems that were constantly arising in regard to my professional work along that particular line, and in advising clients on beach filled material as to possible foundations.

Mr. Beach: That's where the tide ebbs and flows?

Witness: Yes.

The Master: And you have formed an opinion, have you, from your examination of the Ontario beach front as to how the natural accretion occurred there?

Witness: Yes, sir.

The Master: Well, I think I will be willing to hear it.

Mr. Sutherland: We object to it.

Mr. Moser: Just a minute, before he does that. May I ask a question or two. Your professional experience has not extended to watching the shores of fresh water lakes where the tide does not ebb and flow?

Witness: Not particularly, no.

The Master: He says not. It has been confined very largely to his experience in living along the beach front on the East Coast.

Mr. Moser: Then I think we will have to object to his testimony on the ground he hasn't qualified. He is not competent.

[fol. 505] Mr. Sutherland: It is pure speculation. It is beyond the limits to which the foundation has been laid here for any expert testimony.

Q. Now, I call your attention to a map purporting to be drawn by Captain T. W. Maurice, showing two projected piers to be thereafter constructed at the mouth of the Genesee River in Lake Ontario. I call your attention to certain soundings upon that map; what do those soundings indicate to you?

A. Depth of water at the time they were taken.

Q. And whether or not they indicate the presence of a considerable bar at that point.

Mr. Sutherland: Let me call the attention of the witness to the legend down here, "Dotted line shows the outer edge of the bar."

A. It does show such a bar, yes, sir.

Q. When the jetty was subsequently constructed, what, in your opinion, was its effect upon the movement of sand in this region?

A. It would in my judgment result in filling up of that triangular area between the westerly jetty and the westerly shore.

Q. Whether or not these cross-sections which we have before us indicate in your judgment a level to which that filling was made by the waters of Lake Ontario.

A. I think it does indicate it, yes.

Q. Whether or not at the outer part of those contours that filling, in your judgment, was made by water or by some other forces, that [fol. 506] is, the portion out toward the lake where the bar rises to some height?

A. You mean the outer portion as shown in our cross-sections?

Q. Yes.

A. Well, I think that elevation was caused by a combination of causes. In all probability three forces, acting jointly, one of water, one of wind, and one of current.

Q. Have you formed any judgment as to the point to which the water raised or deposited the natural material, and the point to which the winds began to operate?

A. No, I think that would be a highly theoretical assumption to make. I don't believe it is possible to determine with any distinction just the result produced by one and the result produced by the other, but it has been my observation under these conditions that wherever there is wave action, wherever there are breakers working, breaking on the shore, there will be bars formed and a sandy beach off shore by that water action, and if those bars are exposed at any time so that the sand dries out, that they will build up by wind action; that is if the prevailing winds are along the beach, or off the lake, or off the water, the tendency will be, when the sands dry, for it to blow up into dunes, just as is occurring at the present time in the so-called Terry Park section of this lot. Also, there is a prevailing current practically which sets down the lake from the west, and which at times is bound to erode the shore more or less and carry material down with it. Some of that material is apt to [fol. 507] deposit in the shallow and quieter reaches of the water, and I think all of those three would combine to build up such a bar or ridge as is indicated there by these successive cross-sections, and that I should expect to find quite a little distance off shore. I might say at the present time there appears to be evidence of similar bars, and that is characteristic where this action takes place, that there are a series of parallel bars; and as I watched the boys in wading there there were apparently at least two such bars as they walked out from the shore, made apparent by their depth in the water, at least two such bars within a comparatively shore distance out from the present water's edge.

Mr. Beach: About how far?

Witness: Well, I don't know that I attempted to determine it, but I think within a few hundred feet, just a few hundred feet.

Mr. Abbot: All right. Your witness.

Mr. Moser: Is that all?

Mr. Abbot: That's all.

Cross-examination (to Mr. Sutherland):

Q. The natural effect, then, of the building of the pier and the drifting in of sand and the action of the current from west to east would be to cause the sand to drife in and build up upon the edge of the lake, causing the dry land to extend farther and farther as time goes on, toward the north.

A. Your question is a little too complicated for me. Can you [fol. 508] separate that?

Q. (Question read by the stenographer.)

A. No, I don't think that's exactly true. It would cause a filling up of the lake itself, but so far as that was caused by water action, of course, that couldn't extend beyond the surface of the lake itself.

Q. No.

A. So that it would not cause the dry land to move outward, but it would build up the lake bottom adjacent to the lake shore.

Q. And as the sand emerges by the forces of the waves and the current, if any, and dries out, the wind will blow it farther inland, will it?

A. The wind will tend to build up dunes, yes.

Q. So that you have got a shore building up by natural processes and extending farther and farther to the north?

A. That depends upon where the sand dries out, of course. If the beach dries out dune action will cause that particular thing.

Q. Are you familiar with the building up of the shore on the north side of the lake directly opposite Charlotte?

A. No, I am not.

Q. Where they speak of the sand dunes?

A. No, I am not.

Q. Do you know the action of the wind in building up great mounds and ridges of sand at the west side of the piers at Sodus Bay?

A. Not particularly, no; but I have seen that action take place in other cases.

[fol. 509] Q. Do you know the fact that all along the south shore of Lake Ontario that process is going on all the time?

A. I should presume likely.

Q. So that you would expect, naturally, from conditions that obtain here along the south shore of Lake Ontario that after the United States Government, in 1829, built piers extending out from the mouth of the Genesee River into Lake Ontario, that in that angle would be formed dry land?

A. I should think it would build up there eventually, yes.

Q. Which before the building of the piers was shallow water under the surface of Lake Ontario?

A. I should think you would get some such results, yes.
Q. Certainly. I think that's all that I care to ask.

(To Mr. Beach:)

Q. In your examination of some of the pits didn't you find some logs down underneath?
A. Yes. I have several of them noted I didn't refer to on my direct examination.
Q. There were a number of them that were pretty good sized logs?
A. Yes.
Q. That were buried down there in the sand?
A. Yes, sir.
Q. And from what you know about the situation, and what you have heard, and what you have been discussing, it was apparent that those drifted in or deposited there?
A. I think a great many of those round, irregular shaped logs were merely drift logs, drifted in there at some time, yes, sir.
Q. In some instances they were partially covered by sand which you found down there?
A. Yes.
[fol. 510] Q. There was one pit in which you said you found a great many ashes and apparently broken pieces of brick, or something of that kind; that was, I believe, Pit Number 13, was it?
A. No; 17, I think it was.
Q. Well, it was a pit off near the pier?
A. Near the western jetty.
Q. Exactly. Now, that would indicate the remains of a fire, or something of that kind, wouldn't it?
A. Why, I think so, yes.
Q. The evidence shows that there was an old hotel on that spot which burned.
A. Yes, sir.
Q. And the stuff you found there would be the natural result of the burning of a building at that point, wouldn't it?
A. Well, I assumed we were in an old foundation pit, or something of an old hotel there.
Q. Now that you know it was burned, and that was explained to you, that would explain largely the presence of those cinders and those other things in that large amount?
A. Oh, I think in that particular pit, yes.
Q. You were aware that there had been a railroad track built around there in the form of what we called a loop or circular track?
A. I had been told so, yes.
Q. One of those pits was located at or near the location where you found ties, and formed a solid foundation for the railroad bed?
A. Yes.
[fol. 511] Q. And so shaped as to form a slight loop or angle to conform with the curve of the track at that point?
A. Yes. I think that was Number 20.
Q. And various of those pits, in a general way, almost parallel to

Beach avenue and northerly of it, you found indications of swampy growth?

A. Yes, I think in general that was true along there.

Q. To your mind would the deposit of some of the clay that you discovered off to the westerly of Lake avenue, and judging from the fact that it had been broken up—would that indicate to your mind that it might have been put in there by the force of a large stream of water flowing down at flood time through a clay bank?

A. No, I don't think so. It was an entirely different character from what it would have been had it been deposited that way. There is a very characteristic appearance to dry clay that has been refilled in an area and permitted to settle, and that has this characteristic. If it were sluced in in any way, or carried in by water, it would be deposited as sediment and not in lumps which have been subsequently matted together and formed a mottled, irregular appearance in texture.

Q. There is in the evidence a statement that at high water times a creek did bring down a large deposit of mud near that very point.

A. Well, that wouldn't account for this particular layer. It only [fol. 512] occurred in two pits, but it was distinctly a dry clay fill.

(To Mr. Moser:)

Q. This Exhibit 46, which purports to be cross-sections of the land there as you find it, as I understand it it was drawn by taking points at which these pits were dug and then by plotting the curve from those points.

A. Yes.

Q. If it should develope that some of these pits where you found filled-in material were dug at the exact point where there had been a cellar of a building which had been excavated, and which had been excavated down into the sand, and, then, afterwards, material used to fill in those cellars, it would rather upset the plotting of your curve, wouldn't it?

A. So far as those particular pits were concerned; if they went down the full depth of the pit it would. That's why we discarded Number 9, for instance, we had exactly that condition.

Q. Now, if it should develope some of the pits which were dug were placed exactly where there had been a cellar, it would upset your calculations so far as that was concerned?

A. Well, only to the extent that the fill applies, that is, so far as the depth of the fill was concerned that would affect it.

Q. It might carry the fill down deeper than the natural level of the sand?

A. That is true.

Q. So to that extent it would destroy your curve?

A. It would. That particular pit would be subject to question, of course.

[fol. 513] Q. If there were two or three such pits it would destroy your entire curve, upset the value of your entire cross-section?

A. Of course, if they were all that way, it would destroy them all to the extent——

Q. Well, there are not so many. You have a cross-section here on which there are only six pits, and you destroy the value of two of those six pits and it destroys your curve, doesn't it?

A. In that particular instance, however, we have the organic—the old marsh level surface, which, of course, determines the level before any fill went on there.

Q. Well, I am not talking about that particular one, but the depression of two pits where you have six, destroys your whole curve?

A. Well, to the extent that would occur, of course, it would affect the reasoning.

(To Mr. Beach:)

Q. On this cross-section Number 20 is indicated as one where the ties were put *it*, isn't it?

A. Yes, I think so.

Q. And that shows about the lowest point of the fill?

A. Yes. The ties were at a low level there.

Q. And if you dug down deep enough to put the ties at water level to build up the railroad bed from that point, naturally, at that particular pit there would be more artificial fill than at adjacent points, wouldn't there?

A. Why, yes, if they dug down to put ties in, naturally they would have that much excess fill over what they would have if they didn't dig.

[fol. 514] Q. Now, the cross-section in which Pit Number 20 appears, shows the fill at the lowest point of any at that end, that is, the lake end, doesn't it?

A. Yes.

Q. And that fill, then, is explained by the necessity of getting a firm foundation for the railroad; isn't that so?

A. Well, that's speculative; I couldn't say.

Q. And there wasn't any pit taken or dug near that point, either east or west of it, was there, that you know of?

A. Not in the immediate vicinity, no.

Q. The cross-section does not include pits numbers 1 and 2?

A. I think not; I think they were off line of any given cross-section.

Q. I show the witness Defendants' Exhibit Number 8, being tracing map, and I call your attention to Pits Numbers 1 and Number 2, lying easterly and westerly of Number 20: do you see it?

A. Yes, sir.

Q. Now, have you your notes?

A. Yes.

Q. At that point, Number 1, what is the depth to which you said artificial fill was found?

A. 248.5.

Q. Will you look at Number 20, and say to what depth artificial fill occurred, according to your figures?

A. 247.5, a foot lower.

Q. And Number 2?

A. Number 2 was 248.3.

Q. So that indicates that your cross-section at Number 20 is about a foot lower than either at numbers 1 or 2, which are almost in a direct line east and west of it?

A. Yes.

[fol. 515] Q. So that would follow out the question I asked you before, that Number 20 is apparently filled in deeper because of the test pit made at the point where the foundation of the tracks was laid?

A. If there was an excavation for the tracks, of course, the fill would be that much deeper.

Q. Well, you did say it appeared that there was one for the tracks at Number 20?

A. I didn't intend to.

Q. Well, I understood you to say the ties were apparently put in there for the purpose of the foundation of the tracks at Number 20.

A. Yes, it was. It was floored over with the ties.

Mr. Oviatt: Mr. Gray testified the ties were thrown right in on the surface.

Q. So your cross-section, the one ending with Pit Number 20, would not show correctly a cross-section had it been made about at Number 1 or Number 2 Test Pit.

A. Well, obviously not.

Mr. Beach: I think that's all.

Mr. Abbot: Well, we have nothing more that we desire to ask.

The Master: May I ask Colonel Dow one question?

Mr. Abbot: Surely, your Honor.

(To the Master:)

Q. Colonel Dow, what is the distance, approximately, from the Pit 14, say, to Pit 25?

A. Why, it is—Perhaps I can tell if I see the scale. I can only tell you approximately. (Witness refers to map.) Why, I should [fol. 516] think approximately 2,000 feet.

Q. Now, this entire distance from Pit 14 to Pit 25 is accounted for in these cross-sections, is it not? That is to say, you have made cross-sections——

A. Well, I think that's correct. The last cross-section is just west of Lake avenue; the first cross-section is along the line from Pit 13 to 15.

Q. Yes.

A. The next one from Pit 11 to 20.

Q. Yes.

A. The next one from Pit 10 to 35; and the last one from Pit 34 to 43. That should be 43.

Q. Yes. Now, in your investigation of these pits or trenches you found, did you, that what you call the natural fill or natural accretion got higher as you got toward the lake?

A. Yes. It was substantially 247 in this inside area adjacent to Beach avenue. As we got out here a matter of two or three hundred feet north of Beach avenue it commenced to rise and formed what appeared to be a ridge running east and west, and substantially parallel with Beach avenue.

Q. Now, you say it got higher; how much higher did it get?

A. From a foot to a foot and a half, if I remember rightly.

Q. From a foot to a foot and a half.

A. Yes. It might have come up two feet. I think it did in some cases, two feet.

Q. So that substantially that area there was all practically level?

A. With that exception, yes.

Q. A rise of a foot and a half or two feet in a couple of thousand [fol. 517] feet would not be regarded as a hill?

A. No, it is merely a well defined ridge.

Q. It was generally level, with depressions here and there throughout?

A. Yes.

Q. These lines as shown in these pit drawings, are made straight where the line separating different strata occur?

A. Yes.

Q. Of course, they were not exactly straight?

A. No, never are. It is always an irregular line.

Q. Irregular, of course. You made them straight because that was the simplest way to draw them?

A. Yes.

Q. There appeared to be, did there not, over this entire area, some natural accretion and some artificial fill?

A. Yes; that's my judgment.

Q. Did you find any instances where the artificial fill was rested immediately upon the gray sand, or did you always find an old surface below the artificial fill?

A. In the main the artificial fill rested upon some form of mud or peat deposit, but there were a few cases, particularly as we went in a westerly direction, the other side of Lake avenue, where, as I recall it, the artificial fill rested directly upon the gray sand which I believe was formed there by natural causes, possibly by water.

Q. But would you say that generally speaking this fill which you have described, and which in your judgment you think to have been artificially placed there, was never more than about two to four feet, was it?

[fol. 518] A. Approximately, yes; sometimes less than two.

Q. And the natural mud and gray sand below it extended for a foot and a half to two or three feet all over there?

A. Yes.

Q. And then you came to the water?

A. Yes.

Q. What I'm getting at is this: was this artificial fill, as you have described it, built upon land, or was it built upon water?

A. Well, it was built in most part upon a marsh, upon an old marsh, and, of course, marsh can only be formed in the presence of water, so that at some time or other—I understand that the lake level fluctuates over quite a wide variation, perhaps six feet or so, and that the Government charts show records as high as just slightly under 249—that appears to be an unusual case, I think it has been reached twice, substantially so in the period of the records, and that it goes down at times as low as 243; so, obviously, there would be times when that area would not be covered, and there would be times when it would be covered with water, depending upon the time of the particular stage of the lake. But evidence of marsh area is indicative of the presence at frequent periods, or for protracted periods, of water carriage; otherwise, marsh couldn't form, because it is composed very largely of sediment, which is composed very largely of water, so that some water, at least a few inches or a foot, would have to be present to allow that diffluence of silt material to [fol. 519] settle down as a blanket and at some time be covered sufficiently enough to settle down so as to permit vegetation to come and thus account for the roots and fibrous and organic material that appear in the pit at the present time.

Q. These pits were dug under your direction, weren't they, generally?

A. Yes.

Q. And you went down until you either struck water or were obstructed by these ties or otherwise?

A. That's correct.

Q. How far below the lower part of what you called the artificial fill did you generally strike the water line?

A. I don't think I follow your question exactly.

Q. Well, at one of these trenches, take one of these trench sketches. This is Number 25 now. You have the yellow there. Does that indicate the artificial fill?

A. Yes.

Q. And the next indicate the fine gravel, fine sand?

A. Yes.

Q. And the organic sand below?

A. Yes.

Q. Now, that you don't think — is artificial fill?

A. No, I don't think any of that is. That particular 25 is the extreme westerly pit, and that was the one I say I think was formed by wind formation entirely. It is being duplicated today right along side on the surface.

Q. On the average, how far below this line which is the lower line of what you call the artificial fill, did you get before you struck the bottom of the pit where you were stopped by water?

A. Oh, eighteen inches to two feet.

Q. So there was in every instance, was there, something between [fol. 520] the lower strata of the artificial fill and what you call the water line?

A. Oh, yes, with the exception of those places where we struck ties.

Q. Yes. And that obstructed you from going to the water line?
A. Yes.
Q. And those were at the lowest places, were they, where you found the ties? That is to say, that is where the greatest amount of the fill was?
A. Not always, I think. That was true in Pit 20, which is one of the outer ones. Pit 14 it was not so. It was only three feet to the top of the ties there; four feet in Number 20. Now, the other one that had ties in it was Number——

Mr. Beach: Number 11?
A. Was it 11?
—. Yes, 11. There were only two and a half feet of fill before we struck the top of the ties there.
Q. Two and a half?
A. Yes.
Q. Did you find that in each pit, what you called a while ago a former surface, consisting of organic material, mud or silt, above the gray sand?
A. That was not uniformly so; but it was true in the majority of cases. There was either at or about elevation 249.—Now, that may mean 246½, or 247½; but substantially around elevation 247, in the great majority of pits, there was either a distinct old marsh level, a mixture of sand and mud, or a little streak of black mud, or some other indication that at some time or other silt had been deposited on that level, and that for a period that was the lake bottom at that [fol. 521] particular point, and received this sedimentation that was deposited through the water.
Q. Of course, you can't tell from your investigation now whether or not when that artificial fill was put on that old surface that old surface was below the water or above the water?
A. No; it would depend upon the stage of the lake at that time.
Q. That would depend upon the stage of the lake at that time?
A. If it was extreme high water that marsh would be two feet under the water; if it were extreme low water, it would be four feet out of water, four feet above the lake level.

To Mr. Beach:

Q. Now, I wish you would take Number 15 first on your notes and tell us what you found under what you called artificial fill.
A. A very deep sand.
Q. There was no marsh there, was there?
A. No. There was, however,—I have noticed here a little mud streak about .4 of a foot thick between 247 and 246.6.
Q. But the artificial fill was between what you call gray, deep sand?
A. Yes.
Q. Take Number 3. These are the most northerly pits I am taking now?
A. Yes.

Q. Tell us what you found under your so-called artificial fill?

A. Immediately under the artificial fill was the gray sand and gravel, and before that, at 247.6, was a thin streak of mud.

Q. The gray sand and gravel was the deep sand and gravel, as you [fol. 522] called it?

A. Yes.

Q. Take Number 2 the same way.

A. Number 2? There is no material noted between the artificial fill and the gray sand.

Q. All right. So that would not indicate any marsh there, would it?

A. No.

Q. All right. Take Number 1?

A. Number 1 shows a thin streak of mud at 246½.

Q. What depth of artificial fill did you note there?

A. Well, artificial fill there is two feet in thickness and it overlies a layer—It overlies this ridge that is shown on that cross-section, this ridge of gray sand.

Q. Yes.

A. Which itself rests over the old marsh level.

Q. Of course, Number 20, that was all filled down to the ties, so that wouldn't indicate anything?

A. Yes.

Q. Did I ask you about Number 15?

A. You asked about that first. I think it is generally true that the indications of the existence of an old marsh is less noticeable in the outer area near the beach than it is back in the area adjacent to Beach Avenue. In other words, in the great majority of the pits near Beach Avenue there was a well defined area of peat or old marshy surface, whereas whatever appears at substantially the same surface at the outside level of the beach is usually in the form of a streak of mud.

Q. You have only indicated one pit out of five that I asked you about where there is that indication of old marsh.

A. I said the artificial fill was immediately over a deposit of gray [fol. 523] sand, but under that gray sand, at substantially the same level, namely, 247, there was in all instances which I read to you, the streak of mud.

Q. But the point I was asking you about particularly was that the so-called fill was between the gray beach sand.

A. Out there where that ridge was it is true.

Q. And that is true throughout the territory except along near to a parallel with Beach avenue?

A. Yes.

Q. In other words, an indication that there was a marsh along near to present Beach avenue and north of it?

A. Yes, sir.

Q. And that's where you found the indications of such marsh prevalent?

A. Yes.

Mr. Moser: North of that there was this ridge?

Q. North of that there was a higher sand ridge; that's true, isn't it?

A. Yes, above the old marsh level.

Q. Now, will you look at your notes, Numbers 1 and 2, and with permission of counsel I am going to ask you to draw a rough lead pencil line on the cross-section ending with Pit Number 20, where your apparent fill would come, based upon Pits Number 1 and 2.

A. (Witness draws line as requested.)

Q. Yes. So that that cross-section, had it been taken a few feet east or west of Pit 20, would have indicated as you have shown in lead pencil upon this?

A. Well, those pits, of course, are several feet away. They are quite a substantial distance.

[fol. 524] Q. Well, how far?

A. Oh, seventy-five feet, I should say. One inch equals fifty feet. You see that's about a hundred feet there. Seventy-five or eighty, they are.

(To Mr. Moser:)

Q. Again referring to this cross-section, Exhibit 46, Section B-B, Pits 22 and 23 which are back on this ridge show no organic matter at all?

A. Well, it apparently wasn't enough to indicate there. This was designed primarily to show the division between the artificial and the other fill. I can verify that for you. (Refers to notes.) No, neither of those showed any organic matter.

Q. Then Section C-C, Pits Number 37, which is between two ridges, two higher ridges, shows no mud or silt?

A. That's true.

Q. And on Section D-O?

A. I don't know anything about those.

Q. Oh, you don't know anything about those. On all of these cross-sections the points at which the artificial fill seems to be entirely on top of the organic matter are between the ridge and the nigh land at the south?

A. Yes.

Q. And when you get to the northward and toward the lake from Beach avenue you find this ridge of sand without any organic matter between the fill and the ridge of sand?

A. That's substantially correct, yes.

Q. So that apparently there was a ridge of high land between the lake and the swamp in the rear?

A. Yes.

Q. And the organic matter was the organic matter that was formed in the swamp between the ridge and the high land to the south?

A. I think that's very likely.

[fol. 525] At this point the map which has been referred to by counsel was marked, "Plaintiff's Exhibit 47," for identification.

(To Mr. Poole:)

Q. Did you find in any of the pits, 28, 29, 30, 31 and 32, any black loam or organic matter between what you call artificial fill and the natural sand?

A. Will you give me those numbers again, please?

Q. 28, 29, 30, 31 and 32.

A. 28, none appeared; 29 showed six inches of it at substantially elevation 247; 30 showed none; 31 none; 32, none. Is that all?

Q. Now, in those cases where your answer is, "None," the artificial fill was directly on the natural sand?

A. That's true.

The Master: Any further questions of this witness?

Mr. Abbot: I would just like to put one question.

(To Mr. Abbot:)

Q. Colonel Gow, taking this cross-section here, will you state to what height the lake would have to rise in order to submerge the division between natural and artificial fill if it were not for this ridge or bar on the outside?

A. Do you mean exclusive of the part of the ridge?

Q. Yes.

A. Well, if you excluded the area on which the ridge of sand rests, gray sand, then the other area would begin to be flooded when the lake got up 247, approximately. In order to submerge the ridge, however, it would have to get up to 249.

[fol. 526] Mr. Oviatt: The peak of the ridge?

A. Yes, the peak of the ridge.

(To Mr. Oviatt:)

Q. Colonel, to what height would the waters of the lake have to rise in the normal fluctuations in order to submerge the lands between the ridge and the shore and leave the ridge appearing above the level of the lake?

A. Well, any height of the lake above 247 would submerge the land adjacent to Beach avenue and leave a ridge standing above water outside. That is true until the lake rose to 249, which is the maximum height which it has ever come.

Q. Now, assuming that the waters rose to 247½ in its fluctuations, how wide would the ridge of land be to the north of the body of water over the submerged lands along Beach avenue.

A. Why, substantially four hundred feet.

Q. And how wide would the body of water be between the ridge and the most southerly pit in that cross-section?

A. Well, taking Pit 13, which is over the other side of the street, and giving the maximum, of course, and that would be about three hundred feet.

Q. And if the waters rose to 247¾, we will say, how wide would the ridge be, and how wide would the body of water be between the land and the ridge?

A. Well, the ridge would then narrow down to a little over two hundred feet, and the water distance from the ridge to the land would then be, oh, perhaps four hundred feet.

[fol. 527] Mr. Sutherland: That is from north to south?

Witness: Yes; measuring northerly and southerly direction.

Q. And if the waters rose to 248, how wide would the ridge be, and how wide would the body of water be between the two lands?

A. Well, the ridge would be a trifle over two hundred feet in width at the maximum point, and about a hundred and fifty feet, one hundred and forty feet at other points; and the distance from the ridge to the shore represented by the water would then be four hundred and fifty feet.

Q. And assuming that the lake level in its fluctuations reached a point 248½, how wide would the ridge be, and how wide would the body of water be between the ridge and the shore?

A. Well, the ridge, at its maximum width, would be about a hundred and seventy-five feet, and the distance to the shore, that point would be a little under five hundred feet.

Q. And assuming the waters to be at 248½, would there be two ridges in one of those cross-sections, with water between them?

A. In Cross-section C-C, the third one. Pardon me, did you say 248½?

Q. Yes.

A. Water at 248½, there would be two ridges with a pond between them.

Q. So that in case of a recurrence of the lake level to 248½, whenever that might occur or recur, you would have a large body of water between these two ridges and the shore?

A. That's correct.

[fol. 528] Q. And you would always have a body of water on the natural bottom there if it were not for the filling in, at a level of 247½?

A. Yes.

Q. And the answers that you have given to my questions are answers which are based upon the absence of artificial fill and the permanence of what you have testified would be the upper level of the natural formation?

A. Yes; in other words, if the artificial fill were removed from the area, those are the conditions that would occur.

Q. And the flood conditions, the waters on top of the natural land to which you have testified?

A. Yes.

Q. Now, do you know what the level of the lake was at the time you examined the pits and found water in the bottom?

A. I made some inquiries, and was told it was approximately 245½ at that time.

Q. And do you know what the fluctuations are in the level of the lake?

Mr. Moser: Oh, prove that by somebody who knows. He has only been told.

Mr. Oviatt: I am asking him.

Q. Do you know?
A. I do not know.

(To Mr. Moser:)

Q. Now, supposing what you call the artificial fill were entirely removed and the water were at a level of 247½, what would be the depth of this pond of water between the sand bar and the high lands to the south of it?
A. About six inches.
[fol. 529] Q. The water would be about six inches deep?
A. Yes.
Q. Over a little marshy place, with the stage of the water 247½?
A. Yes, sir.
Q. And with the stage of the water at 248½ the water in this marsh would be only about a foot and a half deep?
A. Eighteen inches, that's right.
Q. You would have a marsh then with a foot and a half of water in it, with not more than a foot and a half of water in it, and some places shallower, and perhaps four hundred feet wide?
A Yes.
Q. Between the bar of land separating the lake from the main land?
A. Yes.
Q. And on the other hand by the high lands to the south?
A. That's right.

(To Mr. Poole:)

Q. I would like to ask a question. Does any of this testimony that you have given in regard to water between the bar and the south shore pertain at all to any of the land around pits 28 to 32, inclusive?
A. (Witness refers to notes.)
Q. You haven't any cross-section of that?
A. No, we have no cross-sections at that point. At Pit 28 the level of the natural deposit is 247.8, so that 247½, of course, would not cover that; it would not be covered. 29, the same is true, 247.8. What were the others you mentioned?
Q Inclusive, from 28 to 32.
[fol. 530] A. 30, 248.8; that wouldn't be covered. 31, 247.2. That, of course, would be covered there, .3 of a foot, about three and a half inches of water. 32, 248½. So that only in the case of 31 would there be any water over the naturally formed material.

(To Mr. Moser:)

Q. When you say that with the level of the lake at 247½ there would be about six inches of water in the marsh between the bar and the high lands to the south of it, you mean the waters percolating

through the bar, the level of the lake, would raise the water in that marsh to that point?

A. Yes, if it had no physical connection, no opening, through which to circulate.

Mr. Oviatt: As to which you don't testify whether it had or not?

A. No, I don't know about that.

(To Mr. Beach:)

Q. Wouldn't there be a tendency for the surface of this natural soil to settle when the fill was put on top of it?

A. No, it is not the character of that brown sand to settle. That marshy deposit would yield somewhat, but it is so thin that I shouldn't think the compression would amount to more than an inch or two.

Q. Speakink of this possible flooding at 247½, or whatever it was, at what point did you mean that to be, at a depth of six inches?

A. Well, in general, the level is approximately 247. This line on A-A, on the inner section showing the organic deposit, is substan- [fol. 531] tially at 247, so that with the water at 247½ that would be covered six inches. The same is true on C-C.

Q. Yes, but take it at a point at Beach avenue.

A. Yes.

Q. How deep would it be there at 247½?

A. At the northerly level of Beach avenue it would be, oh, probably a little over three or four inches.

Q. That is, at Beach avenue, if the water were 247½, it would not be over three or four inches in depth?

A. No.

Q. That's your answer?

A. That's right.

Q. And at a point, say, a hundred feet north of Beach avenue, how deep would it be at 247½?

A. Well, it would be barely covered.

Q. And a few feet north of that it would not be covered at all, would it?

A. Well, a hundred and fifty feet from Beach avenue it would cease to be under water.

(To Mr. Moser:)

Q. Now, in the cross-section marked, "D-D," 2 which has pits 33, 34, 43, 44, 45 and 46, with the lake at a level of 247½, would there be any of that land under water?

A. Yes; it would just barely be covered at Pit 34, which is about a hundred feet back of Beach avenue, a hundred feet toward the beach from Beach avenue.

Q. Just barely covered? You mean——

A. There would be a few inches, an inch or two of water over it.

Q. About an inch or two of water over it there. With the level of the lake at 247½, assuming that the water percolated through to

the level of the lake, how wide an area without water would there be [fol. 532] in that Section D-D between the land and Beach avenue?

A. Well, there is no way to tell from this data just where the upland would be made by this natural deposit of fill, but assuming that Pit 13 represents substantially the southerly limit——

Q. Oh, no.

A. Well, then, I can't tell you.

Q. I asked you how far back from Beach avenue.

A. Oh, to Beach avenue? I beg your pardon. To Beach avenue? A hundred and twenty-five feet or so.

Q. There would be water a hundred and twenty-five feet? There is Beach avenue (indicating on map).

A. Oh, I beg your pardon. No, at that point there it would be about fifty feet.

Q. So that the water would be about fifty feet wide and about an inch deep, with the water at 247½?

A. It would be an inch deep at the location of Pit 34. We haven't any record——

Q. You haven't any record to show it would be any deeper than that?

A. No.

Q. And how wide would the land be from where the water met it on the south, to as far out as you have gone?

A. Well, that would be three hundred and twenty-five or thirty feet.

Q. And your data does not go far enough toward the lake to find out where the water would meet it?

A. No. We would have to carry it out farther.

(To Mr. Sutherland:)

Q. You don't wish to modify your statement made to me in any [fol. 533] respect, do you, Colonel, that after the piers were built by the Government, extending out into the lake, land would form in that angle and become dry land by natural processes of accretion, without any artificial fill?

A. That's entirely possible.

Q. Yes. That would be the natural thing to expect, would it not, in that situation?

A. Why, yes. I should expect that just what has occurred here would occur, that you would build up the lake bottom and eventually build up land by wind action.

(To Mr. Moser:)

Q. And if a bar formed from the high land on one side to the pier on the other side, leaving a marshy place in behind, then the tendency would be for that marsh to gradually fill up with silt that washed from the banks?

A. It would tend to silt up, yes.

WILLIAM C. GRAY was thereupon recalled as a witness in behalf of the Defendants testified as follows:

Direct-examination (to Mr. Beach):

Q. Mr. Gray, since the last hearing you have put on a tracing, Defendants' Exhibit Number 8, certain test pits which were not on there when it was put in evidence?

A. Yes, sir.

Q. And these test pits which have been put on since then have been put on according to survey?

A. Yes, sir.

Q. And they are colored red instead of black, as the original?

A. Yes, sir.

Q. To show the fact that they were put on since that date.

A. Yes, sir.

[fol. 534] Mr. Beach: That was done with the consent of counsel, if your Honor please.

Q. On Defendants' Exhibit 8 there has been testified to here by by you that the opening just south of the Spencer House was a basin of water.

A. Yes, sir.

Q. And there has also been testimony that McIntyre, when he lived there prior to the erection of the Spencer House, had his boat in there, or something of that kind.

A. Had his boats in there.

Q. Will you tell us how that basin was formed, and what there was east of it at that time?

A. There was a break in the pier so as to let the waters of the river come into the shore there, that did let the water come in.

Q. There was a break in what pier, the Government pier?

A. In the Government pier, yes, sir.

Q. At one time prior to the time we are talking about, when this basin was used for McIntyre's boats, the Government pier extended entirely arcoss that opening?

A. Yes, sir, and south of it.

Q. Then there was a break in that pier?

A. Yes, sir.

Q. And the water came in?

A. Yes, sir.

Q. And what did it do there?

A. The wash of the sea boats going up and down there kept digging out, formed a basin in there where McIntyre and others kept their row boats.

Q. Prior to that time it was solid up to the pier?

A. Yes, sir.

Q. Now, this Pit Number 14 which has been testified to, which [fol. 535] is indicated exactly in that so-called basin?

A. Yes, sir.

Q. That's where the previous witness has testified he found some ties and filling on top of that?

A. Yes, sir.

Q. Do you recall what was done in regard to that basin when the balloon track was put in?

A. It was done before the balloon track was put in and after the single track was put down.

Q. What was done?

A. That filling in of that basin.

Q. That place were the water had washed out the ground and soil was filled in?

A. Yes, sir.

Q. To level it up with the rest of the surrounding surface?

A. The surrounding surface, yes, sir.

Q. Can you tell us about when that break occurred?

A. Why, I can't give you the year, but it was along about '70, I should think, 1870.

Q. And then, after that, at some later date, the Government rebuilt the pier as it is now?

A. Yes, sir; rebuilt it twice.

Q. One of these test pits which you have put on in red, Number 19——

A. Yes, sir.

Q. That is shown upon what is marked on the map as, "Spencer House"?

A. Yes, sir.

Q. That was a house that burned?

A. Yes, sir.

Mr. Beach: I think that's all.

(To Mr. Moser:)

Q. I show you a tracing and ask you if you made that map.

A. Yes, sir.

Q. That is a map of the Bartholomay property?

A. Yes, sir.

Q. There are shown on that map some figures outlined in red or [fol. 536] pink: what are those?

A. That represents the location of the Whitney houses or cottages as they were when the Bartholomay Company took them over.

Q. And you have remembered that from back in the early '70's?

A. Why, I have known it all my life.

Q. About how far back can you remember this Bartholomay property?

A. Oh, I should say along—Well, definitely since 1873.

Q. Well, now, in 1873 was there any building on that property?

A. Yes, sir.

Q. You testified the other day from a map that you had here that there was a cottage there.

A. Yes, sir.

Q. About where did that cottage stand with reference to this map?
A. Right where you had your finger, the center cottage here.
Q. Where the largest pink cottage is?
A. Yes, sir.
Q. You said that that was afterwards enlarged into the Cottage Hotel.
A. Yes, sir.
Q. Are all these pink cottages here part of the Cottage Hotel?
A. Yes, sir.
Q. That is not the way they stand now?
A. Oh, no.
Q. The Bartholomay Company acquired the property along about 1885?
A. 1885.
Q. And when they acquired it what did they do with reference to the Cottage Hotel? The Cottage Hotel stood there then when they bought it?
A. Yes, sir.
Q. As it shows there in pink?
A. Yes, sir.
Q. What did they do after they acquired it?
[fol. 537] A. I think after 1887 they separated the buildings and put them—Well, they separated the buildings and moved them in different locations.
Q. You made the survey for them at that time?
A. I, didn't have to make that survey; they did it themselves.
Q. But you were there and were familiar with it?
A. Yes, I was there and was familiar with it.
Q. Now, is it indicated on this map how they separated them, and where they moved them to?
A. Yes, sir, and they are all numbered, those that remain there; that is the way they separated and built.
Q. And how are they indicated?
A. By numbers.
Q. Outlined in black?
A. Outlined in black.
Q. So the figures outlined in black are the ones that are there now?
A. Yes, sir.
Q. The large one here, outlined in pink, isn't there now?
A. Oh, no, there are none of these pink ones in the same location except Number 15 and 16. They are exactly in the same location.
Q. This largest pink, was that destroyed?
A. No; they were separated and put some other place.
Q. There is also indicated on here a building outlined in blue; what was that?
A. That was the big pavilion.
Q. Who built that?
A. Bartholomay.
Q. And about when?
A. Well, I think along about 1887.

Q. And what became of it?
A. Burned down.
Q. When did it burn down, do you remember?
[fol. 538] A. I don't remember when it burned down.
Q. A good many years ago?
A. Oh, yes.
Q. You have indicated on this map the location of pits by their numbers?
A. Yes, sir.
Q. Those are located according to survey?
A. Yes, sir.
Q. I notice that on 8 and 9 you have reversed the numbers.
A. Yes, sir.
Q. From what they are on the plaintiff's map (referring to Plaintiff's Exhibit 47 for identification)?
A. Yes.
Q. The pit which you have marked here, 8, it should be 9, and the pit you have marked 34 stands where the old pavilion stood?
A. Yes, sir.
Q. Do you know whether there was a foundation under the pavilion at the place marked 34?
A. Yes, there was.
Q. There was a foundation in the ground?
A. Yes, sir.
Q. And do you know whether there was a foundation at the pit marked "33"?
A. I don't know about the foundation there.
Q. Now, this place where the pits 31 and 32 and 28 are located, that is the Boshart and McIntyre properties?
A. And the New York Central Railroad.
Q. And the New York Central properties?
A. Yes, sir.
Q. Were there any buildings on that—were there ever any buildings on that property?
A. Boshart's lot was almost filled with buildings, two-thirds filled, any way.
Q. Any cellars under them?
A. Yes, sir.
Q. And did the McIntyre lot have any buildings on it?
A. Yes, and a cellar under it.
[fol. 539] Q. And how long ago were those buildings there?
A. Well, they were there in 1920.
Q. How long before that were they there?
A. Well, I can't tell you when McIntyre's building—I mean Boshart's *built* but McIntyre was there quite some time before Boshart's. I should say McIntyre's was there, I should say in 1900.
Q. Wasn't it there very much before that?
A. Well, I won't be certain about that.
Q. Well, did those buildings have cellars under them?
A. Yes.
Q. And what became of those buildings?
A. They were razed.

Q. When the city took over the property?
A. Yes.
Q. That is, they were torn down?
A. Torn down.
Q. The cellars filled up?
A. Yes.
Q. That was done by the city after they took the property over in 1920?
A. Yes, sir.
Q. Can you tell whether any of those pits that appear on that property are in the location where the cellars were?
A. Why, Pit Number 30 and 31. 30 was in McIntyre's, and 31 was in Boshart's.
Q. Right where the cellars were located?
A. Yes, sir.
Q. Who build the old Cottage Hotel?
A. Jim Whitney.
Q. Back in the——
A. '70's.
Q. In the '70's?
A. Yes, sir.
Q. And he continued to own it until he sold it to the Bartholomay Company?
A. Yes, sir.
Q. In about 1885?
A. Yes, sir.
[fols.540 & 541] Q. And do you know whether the Bartholomay Company was continuously in possession of that property from 1885 down to the time the city took it over in 1920?
A. They were, yes.
Q. You were familiar with it during all these years?
A. Yes.
Q. Doing work for the Bartholomay Company?
A. About every third year I had something to do down there.
Q. You knew the Bartholomay Company was continuously in occupation of it from 1885 to 1920?
A. Yes, sir.
Q. And maintained all those buildings, and built other structures there?
A. All excepting one strip here about a hundred feet wide. They didn't obtain the title to that until '15. With the exception of that they had the whole thing from 1885.
Q. And also during the time that they owned it they built various structures there, and tennis courts and various things, as indicated upon another map that you have testified about?
A. Yes, sir.

Mr. Abbot: No questions.
Mr. Moser: I want to offer this map in evidence.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 15.")

[fol. 542] COLLOQUY BETWEEN MASTER AND COUNSEL

The Master: I have a communication from the assistant attorney general of the state of New York, which I do not know whether counsel have all seen or not.

Mr. Abbot: I have not, Your Honor.

The Master: I will read it for the benefit of counsel, and have it incorporated in the record. It is submitted by Mr. Anson Getman, Assistant Attorney General. (Reading:)

1. The People of the State of New York claim title to all lands formerly under the waters of Lake Ontario south of the international line and not granted by the Legislature of the State of New York directly or by its authority, unless filled in and lost as a result of natural accretion.

2. From the testimony already received it appears that there was an artificial fill to some extent but it does not seem to appear whether this fill was on land under the waters of Lake Ontario or otherwise. Neither is the area filled specifically described so that it may be identified and distinguished from lands which may have been filled by natural accretion.

The State of New York asks the privilege after the Plaintiff and the other defendants have rested, of offering additional testimony; if it so desires, at a later date.

[fol. 543] JOHN N. FERGUSON, witness called in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination (to Mr. Abbot):

Q. Your name is John N. Ferguson?
A. Yes.
Q. Are you the senior assistant civil engineer of the Department of Public Works of the Commonwealth of Massachusetts?
A. I am.
Q. From what institution did you graduate?
A. Massachusetts Institute of Technology.
Q. What year?
A. 1894.
Q. What was your degree?
A. S. B.
Q. In what, civil engineering?
A. Civil Engineering, yes.
Q. Did you enter the service of Massachusetts in 1894?
A. I did.
Q. Subsequent to your graduation?
A. I did.
Q. And have you remained in that service ever since?
A. Yes.

Q. Whether or not in the course of your duties of the Commonwealth of Massachusetts, you have had occasion to examine soil to determine whether the same was artificially filled or naturally deposited?

A. I have.

Q. In connection with what work?

A. The Charles River embankment of the city of Boston; the construction of the Fish Pier; the Commonwealth Pier; the Commonwealth Dry Dock in South Boston; the investigation connected with the traffic tunnel from Boston to East Boston, and making borings in development of the East Boston Water Front.

[fol. 544] Q. Have you also made similar examinations in connection with other works than those you have named?

A. Yes.

Q. Those simply represent large jobs on which you have worked?

A. Yes.

Q. Which of the large jobs that you have named involved the distinction between the material artificially placed and material naturally deposited by water?

A. That on the Boston embankment; that on the Fish Pier; that in connection with the traffic tunnel, and the East Boston Water Front development.

Q. Did the Dry Dock also?

A. Yes.

Q. And in each of these cases the responsibility for determining that question rested on your?

A. Yes.

Q. Were you the engineer in charge of the construction of the Charles River embankment, the Fish Pier, the Commonwealth Pier, the Commonwealth Dry Dock, and of the investigation for the East Boston Traffic Tunnel?

A. I was.

Q. Also engineer in charge of dredging the Boston Harbor and construction of the sea wall down in Pemberton?

A. Yes.

Q. The Dry Dock to which you have referred is the largest Dry Dock in the United States, is it not?

A. Yes.

Q. And the second largest in the world?

A. Yes.

Q. You superintended the digging of the various pits on the premises in dispute, did you not?

A. I did.

Q. Under Colonel Gow's direction?

A. Yes.

Q. Did you determine the level of the stakes driven at each pit from which the levels of the materials in that pit were measured?

[fol. 545] A. I did.

Q. From what did you take that level?

A. The bench mark on the old lighthouse at Charlotte, used by the United States Government.

Mr. Abbot: I have here a certificate from Lansing J. Beach, Major General, Chief of Engineers, stating that the elevation of the bench mark on the old lighthouse is at 283.168 feet; and that refers to above mean sea level, the datum to which all these marks have referred.

Mr. Sutherland: Subject to our right to show error if any should appear hereafter, we do not object to the data going in.

Mr. Abbot: I offer that in evidence.

(Whereupon the paper referred to was received in evidence and marked Plaintiff's Exhibit 48.)

Q. Did you take the elevation of that bench mark at 283.168 feet?

A. I did.

Q. Did you run that level to a bench mark of the city of Rochester situated at the intersection of Beach and Lake avenues?

A. I ran the levels from that bench mark to that point.

Q. What was the level of that city bench mark?

A. 251.758.

Q. And the levels of the various stakes that were driven to show the levels of the materials in the pits were all referred back to that city bench mark, d-termined as you have described?

A. Yes.

[fol. 546] Q. And those figures 251.758 refer to the heighth above mean sea level at New York?

A. Yes.

Q. There were put in evidence yesterday when Colonel Gow was on the stand certain sheets, showing the levels at the northerly and southerly ends of those various pits. Were those sheets prepared by you?

A. They were.

Q. Do the sheets accurately record your observations at the North and South ends of each pit?

A. They do, as I took them.

Q. Did you, in each pit, find material which you determined to have been artificially placed?

A. In my judgment.

Mr. Moser: That is subject to our objection.

Mr. Sutherland: We want to object to that upon the same ground that we took in regard to the testimony of Colonel Gow on the same subject.

The Master: It goes in subject to exception.

Mr. Sutherland: And we take the same exception.

A. I did.

Mr. Abbot: Now simply for the purpose of getting the data shown on these sheets into the record I shall ask the witness to read the

level of the north and south ends of the pits as I give them at which he determined the division line between the material naturally deposited and the material artificially placed.

Mr. Sutherland: We won't have any objection. If he checks exactly with Colonel Gow, you would have a comprehensive question [fol. 547] insead of going over the whole thing, pit by pit. Subject to the objection to the testimony, and the exception, we do not mean to take an hour or two to check this whole thing over.

Mr. Abbot: I do not want to check the whole thing over but this witness took the levels at the north and south ends of the pit. Colonel Gow took the level at the middle. There was a slight discrepancy between the two observations and we thought it proper that the difference, whatever there was, be shown upon the record.

Mr. Sutherland: All right.

Mr. Abbot: But if Your Honor would prefer that I should simply put the comprehensive question, I should be glad to do it.

The Master: Put it in whatever way you prefer.

Mr. Sutherland: Mr. Ferguson's charts are in evidence and they show upon their face what Mr. Ferguson's work was and what his measurements were. I take it that you have shown by Mr. Ferguson that he made those charts agreeable to the measurements which he took. Now it would not seem to me worth Your Honor's time to have every one of them picked out and gone over again.

The Master: I do not think so.

Mr. Abbot: I am satisfied with that suggestion.

The Master: Let us do it the shorter way then.

Mr. Sutherland: This will be taken subject to our objection and [fol. 548] exception to You Honor's ruling.

The Master: Yes.

Q. Do these sheets in each case disclose the line between natural and artificial fill?

A. As determined by me, yes.

Q. In each case you have colored the material determined by you to be artificial fill, yellow, and you have indicated the natural material in black or gray as the case may be, have you not?

A. Yes.

Q. Whether or not those delineations are correct as determined by you referring to the north and south end of each pit?

A. Yes except one pit, which extended generally easterly and westerly.

Q. I was going to ask you a question on that. Those pits were how long?

A. About six feet.

Q. Was the long length at approximately right angles to the lake?

A. Generally so with one exception.

Q. And that exception was what?

A. No. 14, which extended easterly and westerly.

Q. The others extended northerly and southerly, in those general directions?

A. Yes.

Q. Were photographs of the various pits taken in your presence and under your direction?

A. Yes.

Q. Did you place the level which shows the various heighths in each pit?

A. Yes.

Q. Have you those photographs here?

A. Yes.

Q. I show you as a sample a photograph of pit No. 39. In that [fol. 549] pit appears a white card standing vertically in the pit with numbers upon it; 250, 249, 248, 247, is that the level to which you refer and which you say you personally placed?

A. Yes. I placed the gauge at that level, yes.

Q. Well this card you referred to then, is the gauge?

A. Yes there was also a card with a number on it.

Q. And you also placed the number?

A. Yes.

Q. Which also shows the number of the pit?

A. Yes.

Q. And those gauges as you called them, were placed with reference to this stake as to which you had already determined the level?

A. Yes.

Mr. Abbot: I will offer those photographs in evidence as a single exhibit.

Mr. Beach: You might read the numbers.

Mr. Abbot: The photographs cover pits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 46, 45, 44, 43 and 39.

Mr. Abbot: I offer those photographs in evidence.

Mr. Beach: I have two here that are marked 38.

(Whereupon the photographs referred to by Mr. Abbot were received in evidence and marked Plaintiff's Exhibit 49.)

[fol. 550] Q. Whether or not certain pits were rejected by you as too indefinite to accord a satisfactory basis for any conclusion?

A. Yes.

Q. What pits were those?

A. Numbers 9, 40, 41 and 42.

Q. And those pits, numbers 9, 40, 41 and 42 have been the basis of no conclusion reached by you?

A. No.

Q. That is they have not been?

A. They have not been.

Q. And the charts for those have not been offered thus far?

A. No I believe not.

Q. Pits 40, 41 and 42 are not on the premises in dispute but are on this area that has been referred to as Terry Park?

A. Yes.

Q. So pit 9 was the only pit upon the premises in dispute that was rejected by you?

A. Yes.

Q. Now there were four pits upon the premises which were not examined by Colonel Gow?

A. Yes.

Q. Those pits being 46, 45, 44 and 43. I ask you what you observed in pit 46, that pit being situated in a line running substantially north and south and including pits 33 and 34?

A. On the northerly end, artificial, above a line from 247.8 to 248.5 and a line drawn between elevation 247.8 and the westerly side of the northerly end to point 248.5 and the easterly side of the northerly end; and on the southerly end above elevation 247.8.

Q. What was the thickness of this artificial material as observed [fol. 551] by you at the northerly end?

A. It varied from 2.7 feet to 3.4 feet.

Q. And at the southerly end?

A. 3.4 feet.

Q. What was the nature of this artificial material at the northerly end?

A. Top soil, layers of sandy soil. Do you want the elevations?

Q. Yes I think we better read them?

A. Top soil from 251.2 to 251.0; layers of sandy soil to 250.5; loam and fine gravel to 250; sandy soil and some gravel from 247.8 to 248.5.

Q. In the southerly end?

A. Top soil and miscellaneous fill from elevation 251.2 to 250.2; clayey soil and miscellaneous from 250.7 to 248.8.

Q. What was the general color of this material which you have described as artificial?

A. It varied from yellowish brown to one streak of gray.

Q. Below this material was what?

A. Some fine sand and some gravel.

Q. Was this readily distinguishable in color from the material you have called artificial?

A. It was.

Q. Does that sheet correctly describe the conditions in pit 46?

A. It does.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet above referred to was received in evidence and marked Plaintiff's Exhibit 50.)

[fol. 552] Q. Now taking trench No. 45, what did you observe in that pit?

A. On the northerly end an artificial fill above 249.5; on the southerly end above elevation 249.7.

Q. The thickness of the artificial fill being what?

A. On the northerly end 1.7 feet; on the southerly end 1.5 feet.

Q. Does that sheet correctly show the conditions?

A. It does.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked Plaintiff's Exhibit 51).

Q. Now trench No. 44, what do you find there?
A. On the northerly end, artificial fill above 249.2, and on the southerly end above elevation 249.5.
Q. The thickness of the fill being what, in each case?
A. On the northerly end 1.7 feet, on the southerly end 1.4 feet.
Q. Does that sheet correctly show the situation in that pit?
A. It does.

Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked Plaintiff's Exhibit 52).

Q. Now trench 43, what did you find in that?
A. On the northerly end artificial fill above 248.6, on the southerly end artificial fill above 248.8.
Q. The thickness of the fill being what, in each case?
A. On the northerly end 2.5 feet, on the southerly end, 2 feet.
Q. Does that sheet correctly show the conditions as you observed them?
A. It does.

[fol. 553] Mr. Abbot: I offer that sheet in evidence.

(Whereupon the sheet referred to was received in evidence and marked Plaintiff's Exhibit 53).

Q. Did you prepare from the data obtained from these pits the cross sections already put in evidence as Exhibit No. 46?
A. I did.
Q. Do these cross sections correctly show the line between natural and artificial material as disclosed by the pits on which they are based?
A. It does, at the pits.
Q. Are the pits dug upon the premises sufficiently numerous to indicate with reasonable accuracy the division line between natural material and artificial fill upon the premises in dispute?
A. In my judgment, yes.
Q. Have you, upon a duplicate of Exhibit No. 4, being the map already prepared by Mr. Vedder plotted correctly the position of the various pits as determined by a survey made by you?
A. I have.
Q. The pits in Terry Park do not appear on this map, as they are beyond the premises in dispute?
A. Yes.
Q. Those pits are numbers 25, 26 and 27 and also 40, 41, 42, the latter three being the three that you disregarded, are they not?
A. Yes.

Q. Have you upon this same duplicate of exhibit No. 4 drawn contours based upon all the pits upon the premises, which contours show the various levels at which the line of division between natural material and artificial fills appears?

A. Yes.

[fol. 554] Q. Is this map that I show you a duplicate of Exhibit 4, to which you have referred?

A. It is, with certain additions.

Q. You refer to the red lines drawn through the numbers of the pits, and the contours placed by you?

A. Yes.

Q. Did you upon the Shepard line and the Finley Line, as appears upon Exhibit 4, draw those lines in red for the purpose of making them stand out more clearly?

A. I did.

Q. And you labelled them Shepard line and Finley Line?

A. Yes.

Q. And those lines so drawn are upon a faint line already upon the map?

A. The straight lines are so drawn.

Mr. Abbot: I will offer that in evidence.

Mr. Sutherland: That is objected to, Your Honor, upon the same ground that we outlined when Colonel Gow was on the stand. I suppose it is merely a characteristic summary of the testimony of Mr. Ferguson and Colonel Gow. As far as making a picture of it is concerned, we do not object to it, but we object to this evidence in its essential content, as incompetent, and no proper foundation laid.

Mr. Moser: I object to it on the ground that it is purely theoretical and wholly speculative.

Mr. Sutherland: The same objection that was taken to the other cross-section diagram.

Mr. Beach: I object to it on the ground that so far as the con-[fol. 555] tour including pit No. 20 specifically is based upon a fill in a hole which was dug for the purpose of making a foundation for the railroad tracks, and it clearly appears that at that point that hole was dug below the natural surface at that time existing, and that therefore the fill at that point, as shown upon this map and upon the contour heretofore offered in evidence is exaggerated beyond what it would be, had such contour been made at a point just east or west of that particular line.

Mr. Moser: I also object to it on the ground that it already appears in the evidence, that pits 28, 29, 30 and 31 were dug in places which had been cellars of buildings, and which had been filled in, so that it is unavailable as data for the purpose of drafting a contour; and also upon the ground that it appears that upon the face of the map that the contour north of pit 29 has no data upon which to base it.

Mr. Beach: I might add also that we object to it because it already appears in the testimony of the man who laid out the so-called fill with reference to the railroad tracks, that hummocks and

high spots were levelled off and low spots were filled up, the result being that all the natural points are not shown upon the map, as they existed at that time, and that this contour takes no account of such levelling off.

The Master: It seems to me that these objections rather go to explain the contradiction of the testimony offered by the exhibits [fol. 556] than to its admissibility or competency in evidence. The objection generally can be taken care of by explanation and contradiction on cross-examination.

Mr. Sutherland: This is not received except as to show the condition which is found today in the pits that have been dug; the witness not assuming to say that this condition obtained thirty years ago, or fifty years ago or seventy years ago; he simply says, this is the way I find the pits today, and this contour or cross-section is the average of the conditions in the various pits, as we find them today. So that I take it all the testimony which is in the case as to the history of the land and as to the actual fact that as far back as human memory goes his was sand out of water, lake sand, and not filled-in stuff,—that is not obliterated by this testimony at all.

The Master: That is a matter or argument. It might not be.

Mr. Abbot: Is this received in evidence, Your Honor?

The Master: Yes.

(Whereupon the paper referred to was received and marked Plaintiff's Exhibit 54.)

Q. Now, I note in this Exhibit 54, certain yellow lines, running [fol. 557] approximately north and south, and letters A A, B B, C C and D D,—what do those yellow lines indicate?

A. Those are the lines on which cross-sections represented on the previous exhibit were made.

Q. So that the yellow line, A A, marks the pits upon which cross-section A A, upon that exhibit is based?

A. Yes.

Q. And the same is true of cross-section B B, C C and D D, with respect to the cross-sections so lettered, upon that exhibit?

A. Yes.

Q. Now, in the testimony given by Colonel Gow, yesterday, as to two pits which I think were pit 1 and pit 27, there appeared some discrepancy, didn't there, between them?

A. Yes.

Q. Are those the two pits as to which that discrepancy appeared, as you remember?

A. I remember No. 1, I don't remember the number of the other.

Examined by Mr. Oviatt:

Q. You heard the testimony of Mr. Gow, yesterday?

A. Yes.

Q. You followed his testimony with reference to pit No. 1?

A. I did.

Q. And it disclosed the fact that there was some difference, a fraction of a foot, between your representation on the exhibit, and Colonel Gow's testimony, as to the depth of fill?

A. Yes.

Q. Do you know what that difference was?

A. Two-tenths of *of* a foot.

[fol. 558] Q. Now can you explain the discrepancy or the apparent discrepancy by reason of the fact that the elevation of the stake had no particular relationship to the surface of the soil?

A. The elevation of the stake at pit No. 1 is two tenths of a foot higher than the surface of the northerly end, as well as the southerly end.

Q. So that that two-tenths of a foot apparent discrepancy is not a discrepancy, but exists in the elevation of the stake level above the surface of the ground?

A. Yes.

By Mr. Abbot:

Q. Now, with respect to No. 27, there appeared some discrepancy there also. What was that discrepancy, do you recall?

A. I don't recall.

By Mr. Oviatt:

Q. Has there been any change in elevation marks or other data, with reference to pit No. 27 at any time subsequent to its examination by Colonel Gow?

A. There was not.

Q. And if any discrepancy exists as between the exhibit showing the vertical section of Pit 27, and the Gow testimony, it must have arisen by reason of misunderstanding between you and Colonel Gow in recording the figures?

A. I would say so.

Q. There was no change of any kind in the data relating to the pit?

A. No sir.

By Mr. Abbot:

Q. Now pits, 25, 26 and 27 are upon the Terry property?

[fol. 559] A. Yes.

Q. Before those pits were dug, did Mr. Vedder lay out on the ground a continuation of the Shepard Line according to the Shepard notes, as it ran across Terry Park?

A. It was laid out under his direction.

Q. Whether or not the approximate center of those pits is located upon the Shepard line, as laid out by Mr. Vedder?

A. It is.

By Mr. Oviatt:

Q. You heard Colonel Gow give testimony yesterday, Mr. Ferguson?

A. Yes.

Q. Did you correctly report to him the elevations upon stakes as determined by you?

A. As far as I remember I did.

Q Did you hear his testimony yesterday with reference to the elevations?

A. Yes, I did.

Q. Did you follow his testimony by your notes?

A. I did not wholly.

Q. Did you in some parts?

A. I did, in part of it.

Q. And that is all?

A. Yes.

Q. And whatever reports you made to Colonel Gow as to data upon the stakes in the pit was correct?

A. Yes.

Cross-examined by Mr. Sutherland:

Q. Have you watched the effect of overlying lake sand with other material, as to the stability of the new stratum that is formed by the overlaid material?

A. No, I have not.

[fol. 560] Q. Lake sand is lighter than ordinary soil, is it not?

A. It depends on the kind of the soil.

Q. Well, it is lighter than loam or clay, is it not?

A. I wouldn't say that it is lighter than loam.

Q. Isn't it a fact that where natural soil heavier than lake sand is laid over lake sand, that the heavier soil, through the action of water on the lake sand, permeates or settles down, the heavier substance works down into the sand, does it not?

A. There will be slight compression from the superimposed load.

Q. That is an appreciable factor, is it not? That is not a mere infinitesimal compression, it is an appreciable, actual condition in levels which time brings about.

A. That depends on the nature of the material, and depends on the superimposed load.

Q. I would suppose all that, too, Mr. Ferguson, yes; but the effect of overlaying heavier soil upon lake sand is this, is it not, that in the course of time as the rains descend and the floods come, and all that sort of thing, that the line of demarkation originally made by the overlying stratum is depressed?

A. My same answer holds. It would if there was sufficient load to compress it. It depends on the load.

Q. The amount of depression depends upon the relative weight of the two strata, does it not?

A. No, sir.

Q. What are the conditions that affect the relative sinking of the original line where the overlying material met the sand; now, what [fol. 561] are the conditions which create a variance in the subsidence of that line of demarcation?

A. The nature of the sand and the weight of the overlying material.

Q. The lighter the sand and the heavier the overlaying material, the more the subsidence of the line of demarcation, is that true?

A. What do you mean by lighter,—in weight?

Q. Yes, not in color, in weight.

A. No, that is not wholly the weight.

Q. Does the presence of a water content in the sand underneath affect to some extent the depression of the underlying sand by the overlying material?

A. It does if that material is not confined; it does if that sand is not confined.

Q. What do you mean by confined? Let us know what you mean by the confining of the underlying sand stratum.

A. Where sand is not in a bed as a whole, and a portion is allowed to be exposed, then, when there is water content in the particles of sand it will flow more readily, especially water sand, than when it is confined.

Q. By water sand, you mean sand washed up by the action of the lake?

A. I mean sand that has been in contact with water.

Q. But lake sand is permeable, is it not? Maybe that is not a well chosen word. Mr. Gray testified that there was quantities of slag dumped into this beach sand at places where they swung around their balloon track, if I remember his testimony rightly, and that now that slag has practically disappeared, that it sank out of sight; and from that I assume the word permeable is the quality of sand which permits a heavier substance to work its way down through it.

[fol. 562] Mr. Oviatt: You are talking about something now distinctly different from the material you were talking about.

Mr Sutherland: No; but maybe I used the word permeable without being understood. I mean the quality of sand which permits a heavier substance to work its way down into it.

Q. Has it, to some extent, the quality of permeability?

A. It depends on the load.

Q. It has that quality, hasn't it, Mr. Ferguson, to some extent at least?

A. It depends on the load applied.

Q. I am speaking of the susceptibility of the sand to a heavier overlying substance. It has that quality, has it not? That susceptibility which I am calling permeability. It has a susceptibility to yield to the heavier substance overlying?

A. Yes.

Q. Then where you find what you might say is the line of demarcation to-day between an overlying substance and an underlying sand stratum of lake sand, that does not necessarily show the

height of the top of the sand when fifty years ago, if we might use that for illustration, something was placed upon the sand in the way of overlying stratum.

A. I do not get the question.

Q. Very well, I will waive it. You are an officer of the Department of Public Works of Massachusetts, are you?

A. Yes.

Q. And is that the department of the government of the Commonwealth which has under its care and jurisdiction the public lands of the Commonwealth?

A. Yes.

[fol. 563] Q. And the physical properties of the Commonwealth?

A. Not wholly.

Q. What properties of the Commonwealth in the nature of physical properties are not under the jurisdiction of your department?

A. All public institutions, all water supply buildings, all buildings connected with sewage works, all the park system, the State Department of Health, and a number of others.

Q. Very well. I see the line. But the territorial or land possessions of the Commonwealth of Massachusetts are under the care and jurisdiction of the department with which you are connected?

A. Only the public lands, that is, water front properties that belong to the State, and the highways.

Q. How long have you been connected with the department officially?

A. Since 1910, with the exception of two years, one of which I was with the Massachusetts Highway Commission, and the other with the Metropolitan Park Commission.

Q. Of course, you have in your department, have you not, Mr. Ferguson, records or inventories, if I may use a word ordinarily applied to personal effects, with regard to lands; you have somewhere in your department records a schedule of the water front properties owned by the Commonwealth of Massachusetts, have you not?

A. Yes.

Q. And how long has that record been kept by the Commonwealth of Massachusetts?

A. That I do not know.

Q. It is something that has been established before your time, has it been?

A. I don't know.

Q. You found such a record when you came into office, did you not?

[fol. 564] A. I have seen the record and the reports.

Q. So that you know there is in your department a schedule or list of the shore front properties owned by the Commonwealth of Massachusetts?

A. I think so.

Q. Mr. Ferguson, has the Commonwealth of Massachusetts carried in that list or schedule any reference whatever to any shore property adjacent to the mouth of the Genesee river, or adjacent to the properties now in question here?

A. I have not seen such.

Q. Don't you know as a fact, Mr. Ferguson, that there has been no such record kept or carried by the Commonwealth of Massachusetts?

A. I do not.

Q. When was your attention first called to the possibility of a claim by Massachusetts upon the property in question in this case?

A. When I saw it in the paper.

Q. When was that, Mr. Ferguson?

A. About two years ago, I think it was.

Q. Was that in a Boston paper?

A. It was.

Q. And was that following a visit made to Boston by some representative of the City Attorney's office in Rochester?

Mr. Oviatt: I object to this line of testimony. It is plainly immaterial, and it has nothing to do with the issue as to how Massachusetts, or how this individual first learned of it; whether it was through any visitor from Rochester or not, certainly this witness can not bind the State of Massachusetts, or his conduct can not in any way reflect upon the issues here as the fact of when he first learned [fol. 565] of this claim has nothing to do with the case. Even a public official can not estop the State of Massachusetts by affirmative action.

Mr. Sutherland: Upon the question of estoppel we deem it very material, because it will appear, your Honor, by the documents which I shall offer in evidence, that Massachusetts, again and again, in her general resolves of her General Court and by the action of commissioners appointed by her General Court for that purpose, declared that when Massachusetts sold her land west of the Phelps & Gorham purchase to Samuel Ogden and Robert Morris, his associate, thereby Massachusetts did divest herself of all of the lands which were ceded to Massachusetts in the Treaty of Hartford. We shall offer in evidence, your Honor, declaration after declaration to that effect, that in and by the sale to Ogden of the lands west of the Phelps & Gorham Purchase Massachusetts abandoned the last of her possessions in Western New York. Now it appears quite clearly, I think, from the testimony of this witness, that Massachusetts never carried in her schedule or list of shore properties any reference whatever to this property on the shore of Lake Ontario, and I wish to show by this witness, or by somebody, that the claim here did not arise out of any record kept by Massachusetts of an existing claim, but has been made because someone from the outside suggested that Massachusetts might have a claim which she might do well to assert. I think it is important as bearing upon the question of estoppel because with all these declarations, with these positive declarations that the sale to Morris took away the last vestige of [fol. 566] property, with the fact that for all these years Massachusetts made no claim, carried no item on her books showing that there was anything left, while we, under the claim of right, expended our money on this property up to hundreds of thousands of dollars,

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keeping in possession of the property for generation after generation, and, now, this attempt to put a claim on the land, it does not arise from any self originated act of Massachusetts at all, but from an outside invitation that somebody has extended to her to come in and make a claim.

The Master: I am going to let the testimony in for this reason. It is true, quite true, as you say, that this witness, if he were the governor of the Commonwealth of Massachusetts, could not bind the State by any act of his with reference to his claim upon this land. But it is quite material in the issue of estoppel, if that issue does appear hereafter, to show that Massachusetts either did or did not have any record among its official archives or any claim to the land in dispute. Now, if that be true, that this witness is in a department where such records were kept, and the witness states that he does not know whether there is any such record or not, then the circumstances which brought to his attention the claim of Massachusetts may have a bearing in determining whether or not there was any such a record; and if it be true that the only basis for the claim of Massachusetts was information brought to the Commonwealth of Massachusetts from the outside as suggested, that might have a bearing, [fol. 567] however remote, upon the question as to whether or not there was any record claim on the part of Massachusetts. It is to that point, and not to the question of whether or not this witness can bind by his action the State of Massachusetts, that I think the testimony is admissible.

[fol. 568] Mr. Sutherland: Your Honor has exactly the line I have in mind.

Mr. Oviatt: Of course, under those circumstances the testimony would be so remote, I take it, to the form of proof, the record, documentary in character, that the only persuasive proof would be by persons who had examined documents presented, and who could testify as a result of that examination there was none such. The fact that a witness had been in the employ of a state for thirteen years and had never had it brought to his attention that there was or was not a document or record, has no bearing on the issues raised in this case. I don't intend to go into a very extended argument, I am merely amplifying the position the little more fully than I did before, but I will enter an exception to the ruling.

The Master: I think it is quite true what you say, Mr. Oviatt, that it is remote, but if we are inquiring here whether or not Massachusetts in any official way, in its records or archives, ever asserted or held or possessed anywhere knowledge of any such claim, it may help us to determine that question by showing that Massachusetts never would have heard of any such claim if somebody hadn't gone to Massachusetts and told her about it. Do you see what I mean?

Mr. Oviatt: Certainly.

Mr. Sutherland: I don't remember just the form of the question. The stenographer has been changed. Suppose I try to reframe it [fol. 569] your Honor.

Q. You have stated, Mr. Ferguson, that the first intimation which came to you that Massachusetts might assert some claim to this shore

property on Lake Ontario was contained in a newspaper article published n Boston about two years ago?

A. Yes.

Q. Do you remember what paper that was in?

A. I do not.

Q. Do you know whether or not that article was pusblished in relation to a visit made to the City of Boston by someone from the office of the Corporation Council of Rochester?

A. I do not.

Q. I ask the same question with reference to a representative of the Department of Public Works of Rochester: do you know whether the superintendent of Public Works of Rochester came to Boston about that time and brought information concerning a possible claim which Massachusetts might make upon this shore land?

A. I do not.

Q. When was your attention first officially drawn to this possibility of the claim of the Commonwealth upon the shore property off the mouth of the Genesee River?

A. The latter part of July, last.

Q. The latter part of July, 1923?

A. '23.

Q. Now, Mr. Ferguson, will you be kind enough to examine the records of the Public Land Department on your return to Boston to see whether there has been carried in the list of shore properties [fol. 570] owned by the Commonwealth any reference to any shore property off the Genesse River?

A. Yes.

Q. So that we may have the benefit of your investigation at some other hearing, perhaps. Now, Mr. Ferguson, if it won't seem like doubling up on the matter on my part I want to ask you again the question which you said you didn't understand. In view of your statement that lake sand has to some extent at least the quality or susceptibility to be permeated by a heavier material overlaid, is it not a fact that by digging a test pit to-day and finding what appeared to you to be a line of present demarcation between lake sand beneath and some different material above,—it is not possible for you to state with scientific accuracy where the top of the lake sand was a generation or two ago when under your hypothesis the overlying material was first placed upon that sand.

Mr. Oviatt: I object to the question upon the ground that it recites testimony which has not been given by this witness, who qualified his answers with reference to the effect of a load on top of lake sand; and upon the further grounds that the question is manifestly intended to appeal to general principles which are conceived of by Judge Sutherland, and to which the witness has not testified, to this particular area where the load is definite of a particular quality, character and kind and the general assumption is with reference [fol. 571] to the possibility of lake sand being permeated by some load on top. Is my objection intelligible to you? It is hardly intelligible to me.

The Master: I quite understand it. He may answer.

A. In my judgment with a load super-imposed on this area the compressibility of the sand beneath would be very slight, or the amount which some material might penetrate due to that super-imposed load.

Q. There would be some depression, however, would there not of the original surface of the sand by the super-imposition of the overlying strata?

A. Very little.

Q. There would be some? Can I get that?

A. Yes.

Q. Thank you.

The Master: Mr. Ferguson, these charts of these trenches were prepared within the last month or two, were they not?

Witness: Yes.

The Master: You examined these various pits?

Witness: Yes.

The Master: And you reached the conclusion in your own judgment as to a certain part of the upper levels of these pits being artificially filled did you not?

Witness: Yes.

The Master: Are you willing to say from your experience that the condition that you found there in these pits in the last month or two was precisely the same as to the various strata that it was fifty or seventy-five years ago?

[fol. 572] Witness: Practically the same.

The Master: It would be practically the same?

Witness: In my judgment.

The Master: Yes?

Witness: Practically the same.

Q. I show the witness defendant's exhibit 7, and I ask you to look at the picture of the sand there on which the house stands, and with which it is surrounded. It appears to you to be lake sand, doesn't it, Mr. Ferguson?

A. I can't tell.

Q. You cannot tell?

A. No.

Q. Well, look at it carefully, now. Hasn't it the appearance of that light soil, showing every imprint of the human foot, and all that sort of thing that lake sand has?

A. I can't tell what the nature of that material is.

Q. Don't you wish to hazard any observation now as to whether that's lake sand or not?

A. No, sir.

Q. Doesn't look like loam to you, does it?

A. Not entirely.

Q. It doesn't look like loam now, does it, Mr. Ferguson?

A. Not wholly.

Q. Well, that's as far as you want to go, is it?

A. Yes.

Q. Now, suppose there were loams overlaid on lake sand, would there come in the course of time as water percolates through from the falling of rain and other causes that exist, wouldn't the two kinds [fol. 573] of soil or earth in a way fuse together so that there would not be in all cases a clear line or demarcation between the two kinds of earth substance?

A. (Witness did not answer.)

Q. Is there no such thing as the fusing of two kinds of earth substance one with the other so that the original clean cut strata become commingled to some extent?

A. Water borne or where water deposits material is placed, it is easy to distinguish from that that is artificially placed.

Q. I am speaking, trying to speak of a quality or tendency to commingle. Is there any such tendency where a layer of earth, loose if you will, is laid over loose sand, beach sand?

A. There is not.

Q. None whatever?

A. In my judgment.

Q. Even if water leaches through the whole thing, with water down underneath, water coming from above, no tendency whatever to commingle the two kinds of substance?

A. Why, there might be some on the very point of contact between the two, the line of contact between the two layers.

Q. Some of the testimony here speaks of what seems to be a mixture of sand and other substance, as you recall it, isn't that true?

A. Yes.

Q. Now, you examined the pits in Terry Park, did you?

A. Yes.

Q. For the purpose of ascertaining whether there was discernible a line of demarkation between what you might call artificial fill and sand from the lake; that was your purpose in examining the pits, wasn't it?

A. Yes.

[fol. 574] Q. And you testified, did you not, that you were not able to ascertain with a sufficiently reasonable accuracy to justify any conclusion in that regard?

A. On three of the pits.

Q. 40, 41 and 42?

A. 40, 41 and 42.

Q. Did you take pictures of those pits?

A. I did, I had them taken.

Q. Is that a photograph of pit 40 (showing witness picture)?

A. It is.

Q. It shows, doesn't it, the nature of the soil there as well as a photograph can show it?

A. It does.

Q. And in that picture you are unable to point out any place indicating an artificial fill over the lake sand?

A. Yes.

Q. Are you able to point it out?
A. I am unable.
Q. You are unable to point it out?
A. To definitely point it out.

Mr. Sutherland: I think we would like this in evidence, your Honor—photograph of Pit Number 40.

(Whereupon the photograph referred to was received in evidence and marked, "Defendants' Exhibit Number 16.")

Q. Is the same thing true with regard to the photograph of Pit Number 42, which I now show you?
A. It is.

Mr. Sutherland: We offer that in evidence.

(Whereupon the photograph referred to was received in evidence and marked, "Defendants' Exhibit Number 17.")

[fol. 575] Q. I show you a photograph at Pit Number 41, and ask you the same question in regard to that which was addressed to you with regard to 40 and 42: are you able in that photograph to indicate where there is any artificial fill super-imposed upon the sand?
A. Not with any certainty.

Mr. Sutherland: I offer that in evidence.

(Whereupon the photograph referred to was received in evidence and marked, "Defendants' Exhibit Number 18.")

(To Mr. Poole:)

Q. How far west are Pits 40, 41 and 42 from the west line of the land in dispute?
A. The nearest Pit Number 27——
Q. I didn't ask you about 27. 40, 41 and 42.
A. Pardon me. The nearest of these Pits, Number 40, is about 625 feet.
Q. And this land that you have been calling Terry Park here lies directly west of the land in dispute?
A. No. There is some other private properties located between Terry Park and this land that's in dispute.
Q. This line of private properties you mentioned not more than 100 feet wide, is it, or thereabouts?
A. I should think it is slightly more than that.
Q. It is not much more than 100 feet, is it, between the land in dispute and the east line of Terry Park?
A. Not much.

Mr. Poole: That's all.

(To Mr. Sutherland:)

Q. Who is the official custodian of the records or books containing the list of shore properties of the Commonwealth of Massachusetts?

A. That, I don't know.

[fol. 576] Q. Where is the list kept, in what office?

A. The list that I've seen is kept in the office of the department of Public Works.

Q. In the capitol?

A. In the State House, Boston.

Q. In the State House in Boston. Who is in charge of the office where that book is now? We want to know the party that a subpœna can be served on.

A. Commissioner of Public Works, William F. Williams.

(To Mr. Beach:)

Q. Mr. Ferguson, were you in the room the other day when Colonel Gow marked on this contour sheet, Plaintiff's Exhibit 46, the line showing the sandy loam or so-called artificial fill at Pits Numbers 1 and 2, lying east and west of Pit Number 20?

A. I was.

Q. Have you any notes or memorandums or recollection as to the depth at which that sandy loam was found in those two pits?

A. (Witness refers to note book.)

Q. In other words, he put a lead pencil mark upon this map, and I want to see if it corresponds with your figures.

A. At the southerly end of Pit Number 1 I found the bottom of the artificial filling to be 248.3.

Q. And Number 2?

A. And at the northerly end of the same pit to be 248.7.

Q. And at Number 2?

A. And at Pit Number 2, on the southerly end the bottom of the artificial to be 247.9, and on the northerly end to be 247.8.

[fol. 577] Q. And Number 3?

A. At Pit Number 3 the bottom of the artificial filling on the southerly end I found to be 247.4, and that on the northerly end to be 247.9.

Q. So that if a cross-section were made running easterly and westerly through Pits 1, 20, 2 and 3, it would show that artificial fill as much less than was indicated by the test pit at Number 20?

A. Some less.

Q. Well, I show you this Exhibit 46, upon which Colonel Gow has marked in lead pencil Pits Numbers 1 and 2, indicating 248 plus as the depth of the artificial fill at those points.

A. The average elevation of the bottom of the artificial filling at Pit Number 1 would be 248.5; that at Number 2, 247.85; that at Number 3 would be 247.65; that at Number 20 would be——

Q. Now, wait a minute. I don't want you to take the average of Number 20 because that was filled in, the test pit down to the ties. I want to see where the natural level, as we have called it, would be,

assuming that that test pit at 20 had not been dug, and if a cross-section had been made across through 1, 2 and 3, because Number 20 doesn't show it as it was on the ground before the artificial hole or test pit. Do you get the idea?

A. With reference to the elevation that was previously given I will give the elevation of Pit Number 20 as——

Q. Now, understand me, Number 20 was an artificial hole wasn't it?

A. Yes.

[fol. 578] Q. And that was filled in there?

A. Yes.

Q. So the fill was below the natural surface at the time that the ties were put in there, that hole was below the natural surface of the ground when the ties were put in there?

A. That, I don't know.

Q. Well, they were much below the natural surface of the ground as indicated by test pits one and two?

A. Some below.

Q. A couple of feet, wasn't it?

A. No.

Q. Colonel Gow indicated substantially 2 feet, didn't he, on this sketch?

A. Yes.

Q. You don't mean to contest his figures?

A. (Witness did not answer.)

Q. Mr. Ferguson, you might work that out afterwards and then you can show it, but I understood you in your examination by Judge Sutherland that you stated that the line of demarcation between the so-called fill and the soil below was pretty sharply marked?

A. Yes.

Q. In all instances?

A. Yes.

Q. And that was so in all of the test pits that you dug and observed?

A. Yes.

Q. Showing a sharp cleavage between the sandy loam and the matter or substance just below it?

A. Yes.

Q. That was both in the territory where sand was found underneath the sandy loam and where the organic matter was found underneath the sandy loam?

A. Yes.

Q. Well, now, wouldn't it be true that if that organic matter under [fol. 579] that sandy loam had been wet and mushy as in a marsh, thoroughly percolated with water, that that heavier sandy loam then would have settled into that mush?

A. It would have compressed it.

Q. Settled down into it?

A. Some.

Q. The stones and heavy material in the sandy loam, wouldn't that have settled down into that soft marshy land?

A. To some extent.
Q. If it had been soft?
A. Yes.
Q. But you found a sharp line of cleavage?
A. Generally.
Q. Well, you said that you did, did you not?
A. Yes.
Q. So that would indicate that that organic matter at the time the sandy loam was put there was substantially dry, wouldn't it?
A. Not necessarily.
Q. Well, logically reasoning from what you have said it would so indicate, wouldn't it?
A. It might be either wet or dry.
Q. You stated that if it had been soft and mushy, as if percolated thoroughly with water, the heavy sandy loam and the gravel and stones in it would have sunk down into that mushy material to a considerable degree; is that so?
A. To some extent.
Q. But you found a sharp line of cleavage, you have already stated?
A. Yes.
Q. That sharp line of cleavage then would indicate that the organic matter upon which the sandy loam was placed was not of [fol. 580] such a condition to permit of much permeation or sinking at that point; isn't that true?
A. It appeared to me that it did not penetrate much.
Q. That would indicate that the organic matter was substantially dry at that time, wouldn't it?
A. It would be either wet or dry.
Q. Now, if it were wet it would go in much more than if it were dry, wouldn't it?
A. (Witness did not answer.)
Q. You know that to be a fact, don't you, that it would penetrate much more if it were soft and mushy than if it were dry?
A. I do not.
Q. You don't?
A. No.

The Master: Will you let me ask him, please?
Mr. Beach: Yes, sir.

The Master: Mr. Ferguson, you have stated in answer to the questions of Mr. Beach, as I understand them, that if this organic matter upon which this yellow substance which you call artificial fill was placed was permeated with water, was soft and mushy, that the heavier substance above would have a tendency to sink down into it, have you not?
A. Compress it.
The Master: To compress it and also to some extent to sink down into it?
A. Yes, to some extent, I did.

The Master: Whereas if it were dry, that is to say the organic [fol. 581] matter were dry, that tendency would not be so great, would it?

A. (Witness did not answer.)

The Master: If you are walking on mushy land you are much more apt to sink into it than if you are walking on a paved road, are you not?

A. Yes, indeed.

The Master: So the line of cleavage between the yellow substance which you call artificial——

A. Yes.

The Master: Is apt to be much more marked and straight if the substance below is dry when the upper material is put upon it than if it is wet, isn't it?

A. It depends upon the nature of that dry material. If that is up and down, wavy, you wouldn't get that even line of demarkation.

The Master: Well, whether wavy, up and down, or straight, if it is dry and hard it won't be permeated as easily as if it is wet and soft, will it?

A. It will not.

Mr. Oviatt: May I point out what seems to be a question of confusion of evidence here?

Mr. Beach: You can go ahead when we get through here, if you will excuse me.

Mr. Oviatt: Wait just a moment. May I, if your Honor please?

Mr. Beach: Surely. Go ahead.

[fol. 852] Mr. Oviatt: I just want to while the subject is up.

Mr. Moser: What are you going to do, ask some question?

Mr. Oviatt: May I, if your Honor please?

The Master: Yes.

Mr. Moser: I suggest that we be permitted to finish our cross-examination before you try to straighten your witness out.

Mr. Oviatt: His Honor said I may.

The Master: I think if there is an objection on the part of those cross-examining the witness, of course, you won't insist, that's all.

Mr. Oviatt: All right, I will reserve it, then.

The Master: So far as I am concerned I am perfectly willing to hear you, but if there is an objection I think you will prefer to reserve it.

Q. Mr. Ferguson, it is a fact, is it not, that the organic matter, whether wet or dry, would tend to pack rather more than sand?

A. Yes.

Q. If it were wet to any depth the weight above it would tend to squeeze out the water, wouldn't it, and to pack the substance down?

A. It would tend to compress it.

Q. And that would reduce the level of the so-called organic matter at that particular point; that's true, isn't it?

A. Yes.

Q. Of course, you can't say how much, assuming the organic

matter was a foot or so thick,—how much a heavy weight would tend [fol. 583] to compress it?

A. I couldn't say.

Q. It would be several inches, wouldn't it?

A. It depends upon the nature of the material.

Q. Sandy loam is heavy, isn't it?

A. I mean the compressed material.

Q. You saw the material there, didn't you?

A. Yes.

Q. And a sandy loam is a heavy material?

A. Yes.

Q. That would tend to compress it down several inches, wouldn't it, at these points in question?

A. No.

Q. How far would you say?

A. I can't say.

Q. Colonel Gow said 2 or 3 inches, do you disagree with him?

Mr. Oviatt: That is objectionable as to the form of the question. This witness testifying to his own knowledge and information and ideas, and not with reference to pointing out errors in other witnesses' testimony.

Mr. Beach: All right, I will withdraw it.

Q. There was a test pit dug at a point south of Beach Avenue, which pit was designated Number 13, do you recall that?

A. Yes.

Q. Now, do you know that that test pit was dug on what was found to be land in 1810 in the Finley Map?

A. (Witness did not answer.)

Q. I show the witness defendants' Exhibit 8, and ask him to look at Pit Number 13 as located by the engineer, and if I am permited to say so, the blue lines enclose sub-section of Lot 21 as laid out by [fol. 584] Finley in 1810. Now, that would indicate that that pit was dug on what was at that time land, would it not?

A. Yes.

Q. Now, from that point northerly the next pit is Number 7?

A. Yes.

Q. And do you recall how far away that was?

A. I do not.

Q. Well, can you scale it or measure it or something?

A. (Witness is shown Plaintiff's Exhibit 46.)

Q. Oh, in round numbers, Mr. Ferguson?

A. About 310 feet.

Q. You didn't make any pit in between those points?

A. No.

Q. You purport on your cross-section to show what the nature of the sub-soil was between those two points of over 310 feet without having made any test: that's true, isn't it?

A. As shown by the diagram by drawing straight lines between the nearest pits.

Q. And that shows this organic matter immediately underlying the sandy loam?

A. Yes.

Q. In a straight line?

A. Yes.

Q. Sustantially in a straight line?

A. Yes.

Q. And whether there are any rises or falls of the organic matter between those two points 310 feet apart you don't know?

A. I do not.

Q. Now, Mr. Ferguson, it has been testified when some of this fill was put in here that there were hummocks, and little hollows, and that a lot of that sand was leveled off before the fill was put on [fol. 585] there. Assuming that is so, would that not tend to throw some doubt upon the actual location of the natural soil as indicated on that map?

Mr. Oviatt: There is no testimony as to that fact save only this, and I object to the question upon the ground it incorrectly states the testimony. The testimony there is that in laying the railroad track that was done. Now, Mr. Beach's question involved a proposition that this whole area was subject to that action. The only place in which this pit can be referable to any such testimony as that is where the track coincides with the pit.

Q. On Exhibit 8, Mr. Ferguson, there are test pits 18, 17, 16, 3, 2, 20, 21, 1, and 4, in more or less close proximity to the balloon track, aren't there?

A. Yes.

Q. Now, if the hummocks and banks of sand were leveled off in proximity to that balloon track so that the natural sand was leveled at those points, those test pits showing natural sand at a certain depth would not indicate the surface as it was naturally and before that artificial leveling, would it?

A. No.

Q. And that would tend to show at those test pits which I have enumerated, that the strata which you found were not the natural strata?

A. If that——

Q. If that occurred?

A. If that had been disturbed. It might average up the same elevation.

[fol. 586] Mr. Beach: I think that's all.

(By Mr. Moser:)

Q. On Exhibit 54, these contours were sketched by you from data obtained from the pits that you dug?

A. Yes.

Q. And that's the only data that you had?

A. Yes.

Q. So that in the parts of the territory where there are no pits you assumed the lines for your contours?

A. I assumed a straight line difference in elevations between pits.

Q. Between pits? You assumed straight lines between pits?

A. Difference in elevation, that is, an even grade.

Q. Yes.

A. From one pit to another.

Q. But as you go westerly from your pits you have carried the lines out westerly of the pits beyond the pits. Now, that, of course, is a pure assumption?

A. I would not say so.

Q. You certainly had no data for your 249 line at Pits 33 and 44, have you?

A. Yes, we have 27 and 26 carried out.

Q. Oh, you have some pits that are not on here?

A. Yes.

Q. Oh, 27 and 26 are in Terry Park?

A. Terry Park.

Q. So that you have some data that is not on this map at all, from which you claim to have sketched these lines?

A. Yes.

Q. Now, of course you know that it is possible that you might have dug a pit in exactly the same place that somebody had dug an excavation before?

A. Yes.

[fol. 587] Q. And which excavation had been filled up. If that was so, of course, the information that you acquired from digging your pit would be deceiving?

A. The dividing line would be represented just the same between what I found artificial and what I considered natural.

Q. Yes, but if the excavation that was made before your excavation was made was made to vary the point of the natural fill, and then artifical fill thrown in there, you would deceived by the level at which you found the line of demarcation, wouldn't you?

A. I should make notes as I found it.

Q. Well, you would not know whether there had been a previous excavation, would you?

A. No, I wouldn't say I did or would.

Q. Now, at Pits 30 and 31, when you made those pits did you know that there had been a previous excavation at exactly those same spots?

A. It looks as though there were excavations in some of those pits; I don't remember which one from the nature of the——

Q. Well, if you know that there had been excavations for cellars down to the water line, the actual water line, in Pits 30 and 31?

A. I did not.

Q. And in making your observations for those pits, and in drawing your contours based on the observation of Pits 30 and 31, you didn't take into consideration that there may have been excavations [fol. 588] there prior to yours that went down below what you considered to be the natural fill?

A. I did not.

Q. Now, on your line D-*L* here, on which you have made a cross-section on Exhibit 46, did you know that Pits 33 and 34 were made exactly the place where previous excavations had been made for foundations for buildings?

A. I did not.

Q. And so if there had been excavations made in exactly those spots for foundations of buildings your data may have been wrong for those pits?

A. My data is correct as represented.

Q. That is, your data is correct as to what you found?

A. Yes.

Q. But it may be false as to the actual condition of the location, the plotting of the natural fill is concerned?

A. I plotted the condition as I found it.

Q. Oh, I understand you plotted it as you found it, but you may have plotted it wrong if your pits were dug in places where there were former excavations.

A. I plotted them as I found the data in these excavations.

Q. Yes, but if your excavation didn't show the true top of the natural fill then your whole plotting of section D-D is wrong, isn't it?

A. Not necessarily.

Q. That is, your assumption is wrong as to the location of the top of the natural fill from Pit 46 to Pit 34?

A. Not necessarily. If that were excavated wholly on that line down to that grade it would be correct.

Q. That is, if you found it like that?

A. Yes.

[fol. 589] Q. But you only excavated it at Pits 33 and 34?

A. Yes.

Q. And you drew a straight line from Pits 33 and 34 up to Pit 46. Now, if it should develop that there had been excavations prior to yours where 33 and 34 went, that went below the level of the top of the surrounding natural soil, then that line instead of being straight should have been in some different location that you can't tell from those pits?

A. Yes.

Q. Precisely. So that in assuming that this diagram shows accurately the natural fill and the artificial fill you have got to assume that there has been no disturbance of the underlying soil in the particular places that you made your pits prior to the time of the digging of your pits?

A (Witness did not answer.)

Q. Don't you understand that question?

A. Will you repeat that again?

Q. (Question read by the stenographer.)

A. Yes.

Q Section D-D is the only cross-section which you attempted to draft west of Lake Avenue?

A. Yes.

Q. Is it true that in none of the pits shown in that cross-section did you find any organic matters?

A. We found a little organic matter in Number 43.

Q. Number 43 is the one nearest the lake, is it?

A. Yes.

Q. In Pits 34, 33 and 46, which are the southerly three of that cross-section, you found no organic matter at all?

A Some of these cases where there was a small layer as shown [fol. 590] by the pits we did not represent it.

Q You can't tell whether you found any there at all. If you did find any it was so insignificant in amount that you did not show it on your cross-section?

A. That's it, yes.

Q. In other words, in the cross-section D-D you show what you believe to be artificial fill laid on top of the lake sand to the entire length of that cross-section?

A. Yes, sir.

(To Mr. Oviatt:)

Q You were asked a number of questions as to the difference in effect in putting a heavier material upon wet, soft and mushy organic material, and upon dry organic material, do you remember?

A. I do.

Q. And you answered the question which combined the three elements, wetness, softness and mushiness, and your answers compared those three elements of the sub-soil with the condition of dryness; is that true?

A. Yes.

Q. So that you were compelled in your answer to assume softness and mushiness with the wetness, am I right?

A. Yes.

Q. You have been asked with reference to the contours of section B-B, and you have been asked certain questions with reference to the fact that Pits 1 and 2 are not shown in Section B - B upon Exhibit Number 46: I asked you whether those pits are disclosed in the contours as drawn upon Exhibit 54?

A. They are.

Q. So that those pits have been made the subject of contour lines upon Exhibit 54?

A. Yes.

[fol. 591] Q. And they could not be made the subject of contour lines on the Exhibit 46 for the reason they were out of the line of the section; am I right?

A. Yes.

Q. Judge Sutherland has examined you at some length concerning the mingling of a heavy load or soil on top of a sandy subsoil, and you have answered those questions as general questions as to the possibility or probability of that occurring, have you not?

A Yes.

Q. Did you find in all this area upon the land in dispute in all of the pits a condition of a clear line of demarcation with no such commingling?

A. I don't remember any such.

Q. You — remember any such commingling at all?

A. I don't remember any such clear line without commingling.

Q. Well, for how great a distance would the commingling occur from this clear line of demarcation that you speak about in this area?

A. That would vary, depending upon the nature of the material. Roughly, about a quarter of an inch.

Q. A quarter of an inch?

A. Yes.

Q. So that the testimony with reference to Judge Sutherland's questions as to the commingling of the two materials has reference to a width of a quarter of an inch along which you say is this line of demarcation between artificial and natural deposit?

A. Approximately that.

[fol. 592] Q. Now, this yellow fill that you have spoken about, did you hear the testimony of Mr. Gray as to the carrying down of yellow material from up the river?

A. I did.

Q. And did you visit the place where this yellow material was supposed to have been excavated?

A. I did.

Q. In company with Mr. Gray?

A. No, sir.

Q. Not in company with him?

A. No, sir.

Q. Did you find the place by reason of Mr. Gray's description where this yellow material had been excavated and brought down?

A. I did not.

Q. You didn't find it? You didn't visit it?

A. I didn't find it through his description.

Q. Oh, did you find it at all?

A. I did.

Q. Did you find up the river the same character of material as that which you found in these pits and which you have characterized as in your judgment artificial fill?

A. It appeared to me to be so.

Q. To be the same?

A To be the same.

Q. And do you remember the witness, Weston?

A. I do.

Q. Was he the man that disclosed to you the whereabouts that this stuff was taken from?

A. He was.

Q. And how far up the river was it?

A. I should think about 2 miles from the mouth of the Genesee.

Q. From the mouth of the Genesee?

A. On the westerly side of the Genesee River.

Q. Did Weston take you there?
A. He did not.

Mr. Oviatt: That's all.

[fol. 593] (To Mr. Beach:)

Q. Well, Mr. Ferguson, these contours shown upon Plaintiff's Exhibit 54, which contours run parallel, or substantially so, with the line of Lake Ontario show the two most northernmost extending from about Pit 20, running easterly, at a point just south of Pit 20, running easterly through 2 and 3 pits, and indicating 247 and a fraction; that's true?
A. (Witness did not answer.)
Q. Can you see it?
A. 247 and 247.5.
Q. Yes. Now, those were what you took as an average depth of the sandy loam along that section; is that right?
A. Average depth of the bottom of the sandy loam.
Q. Exactly. Well, now——
A. Pardon me. They represent the surface at the bottom of the sandy loam.
Q. Yes, what you call the natural surface.
A. Yes.
Q. Yes. Now, you took Pit Number 20 to make that average, didn't you?
A. I did.
Q. And that was where, as has been testified, there was a hole two feet more or less dug to put the ties in; isn't that so?
A. I don't know that.
Q. Well, all right. Now, you have taken that contour running from 20, and based that upon the natural soil as you found it in 20, in which an excavation was made to put the ties; is that true?
A. I don't know about the excavation, but I took 20 as I found it.
Q. Yes.
A. And used it as such.
[fol. 594] Q. At the bottom of the sandy loam.
A. At the bottom of the ties.
Q. Well, what does 247 represent?
A. Represents approximately the bottom of the ties, that is, one layer of railroad ties.
Q. I see. So that if those ties were laid a foot or two feet below the natural surface then 247 doesn't represent the natural surface at any time, does it?
A. No.
Q. But you have purported to show upon that a contour line extending from Pit 20 clear over almost to the pier, and you have purported to say on this sketch that 247 represents the top of the natural soil throughout that line. That is what you meant to convey, isn't it?
A. So far as I could discern, yes, and so far as I could discern in Pit Number 20.

Q. And you took that entirely from Pit Number 20; is that so?

A. And based on those adjacent.

Q. All right. Now, let's take Pit Number 2 again, because I am following this up as I can see that you have misconstrued the effects of these pits at those particular points. Now, let's take Pit Number 2 again, and produce your notes, if you will.

A. (Witness refers to his notes.)

Q. Now, at Pit Number 2, where does the natural surface show on your notes?

A. At the northerly end at elevation 247.8; on the southerly end, at 247.9.

Q. Now, the line which you have drawn through 2 indicates 247.5, doesn't it?

A. Yes.

Q. Then there is an error there, isn't there?

[fol. 595] A. It does not quite coincide with my notes.

Q. And Colonel Gow yesterday gave us the depth of the yellow sandy loam as two feet; how does that compare with your figures?

A. At Pit Number 2?

Q. Pit Number 2.

A. 2.65 feet.

Q. Colonel Gow, as I have it in my notes, and we can correct it or check it up by the minutes, stated that the natural surface was at a point 248.8.

A. (Witness did not answer.)

Q. Your notes don't so indicate, 248.8?

A. My notes indicate the surface at this Pit Number 2 to be 250.5.

Q. Well, I am asking you now what your notes indicate as the surface of the natural soil underneath the sandy loam.

A. Average elevation, 247.85.

Q. Now, I ask you this, if those ties at Pit Number 20, which you took at the level of 247, were laid a distance of one or two feet below the natural level, then your line, 247, wouldn't be correct, would it?

A. No, it is based on what I found.

Q. Now, do you think that that would indicate the level of the natural soil, assuming that those ties were laid below the natural surface?

A. It would not.

Whereupon, at 12:50 o'clock, P. M., a recess was taken until 2:00 o'clock, P. M.

[fol. 596] October 16th, 1923—2:00 o'clock p. m.

Appearances: The same as before.

JOHN N. FERGUSON was thereupon recalled to the stand and testified as follows:

Mr. Oviatt: Have you finished with the witness, Mr. Beach?

Mr. Beach: I would like to put in here the corrections we have been discussing. They ought to be referred to on the record.

Mr. Abbot: I think you ought to proceed with the witness, Mr. Beach.

Mr. Beach: All right.

(To Mr. Beach:)

Q. During the recess you have examined Plaintiff's Exhibit 54 with reference to the so-called contour lines extending easterly from apparently Pit 20 to one just south of that, have you not?

A. Yes.

Q. And the second one from the top runs through Pit Number 2, and is marked 247.5?

A. Yes.

Q. Now you have ascertained from your notes that that does not correctly represent the contour as shown by your notes, have you not?

A. Yes.

Q. In other words, that is not the correct figure on there as it is stated?

A. It is not.

Q. A line north of that mark, 247, purporting to run through Pit Number 20, is so marked from the indications in Pit 20 only, is it not?

A. And Number 2.

[fol. 597] Q. Number 2 is very much higher than 247, is it not?

A Yes.

Q. So that 247 does not represent Number 2 either, does it? Just answer the question, please. 247 does not represent what you found in Pit 2.

A. It does not.

Q. And 247 is the depth of the sandy loam which was put in the test pit where you found ties apparently laid in the form of a mattress as a foundation for the railroad tracks.

A. Yes.

Q. And that line 247 goes only through Test Pit Number 20, shown upon the map, is that true?

A. Yes.

Q. There was no test pit made to the east, is that true?

A Except Number 2.

Q. To the east of the line marked 247?

A No.

Q. Those contour lines you have indicated more or less as parallel with the water indicated upon the north.

A. Yes.

Q. Generally speaking?

A. Yes.

Q. So that if you had drawn a contour line, say, from 35, omitting 20, and through 2, and through 3, the contour would have shown more than 247.5, is that so?

A. You wouldn't say drawing——

Q. I am asking you that question, if there were a contour line drawn through 2 test pit and through 3 test pit, it would show a higher level than 247.5, wouldn't it?

A. You cannot correctly represent a contour through those pits.

Q. I find by drawing a line as you have indicated it here, by drawing it from 35, through 2, through 3, and 15, that line would indicate a higher level than 247.5.

[fol. 598] A. That would represent a line at varying elevations.

Q. It would show a higher line than indicated by 247.5, wouldn't it?

A. Yes.

Q. But you have drawn these so-called contour lines based upon pits at various intervals as shown upon the map?

A. Yes.

Q. And you have averaged them in a way, have you not?

A. Yes.

Q. So that the lines shown upon there in figures of different heights do not actually represent the exact, natural height along those lines; in other words, you have averaged them and assumed something, have you not?

A. Yes.

Q. Now I ask you, assuming that in Pit Number 20 there was a hole dug to put in ties at some distance below the natural surface as it then existed, the line indicated running through 20, and marked 247, is not a correct indication of the natural level as it existed.

A. No.

Mr. Beach: I move to strike out that Exhibit Number 54. It now appears that the lines were not drawn according to the exact measurements made in these test pits as indicated by the witness, that some of the lines were drawn upon assumptions of fact that were not indicated by the test pits, that one of the lines is drawn through Test Pit Number 20, where the evidence indicates there was a hole dug below the natural surface, and he has taken that level from the bottom of that hole. In other words, the map does not correctly portray even the situation which he found by digging test pits.

The Master: As I understand, you move to strike out a portion of that exhibit.

[fol. 599] Mr. Beach: I am satisfied to leave it that way. Strike out the northerly blue lines which have been testified to as being incorrect.

Mr. Oviatt: If your Honor please, the re-direct may precede the determination of that motion with reference to those two lines, I take it.

The Master: Oh, yes.

(To Mr. Oviatt:)

Q. You have stated that the two lines in question, being the most northerly of the contour lines on Exhibit 54, and being respectively 247 and 247.5, were in part drawn upon assumptions. In connection with that statement will you describe the method by which any contour line is drawn in accordance with the most approved method of map making.

A. In such determinations elevations and location points are obtained. Then between those established points a straight line grade is estimated from one to the other, and contour elevations which you have determined to produce on the plan, we will say, are located on this straight grade line in proportion to the difference in elevations between the two points.

Q. And in making drafts of curves of all kinds, not only in mathematical calculations but in map making, you place certain point only and then adjust the difference between the points by drawing your line straight between these two points.

A Yes, we interpolate from one point to the other.

Q. And in drawing contour lines upon maps is it ever practiced that two adjacent points in a line are determined, or is it always practiced that points are determined and the line drawn between [fol. 600] those points indicating the general tendency?

A. Sometimes surveys are made and follow out definitely the location of the contour line, but in general they are obtained in the method I have stated previously.

Q. And in this particular location it would be impossible, physically impossible to locate any contour lines of any kind except by taking specific points which you are able to determine by the digging of pits?

A. Yes.

Q. Now, a contour line represents what, Mr. Ferguson?

A. A line of equal elevation.

Q. So that that line, a contour line, is supposed to represent a level absolutely parallel with the sea level?

Mr Sutherland: I object to that, your Honor.

A A plane through a contour line of the same elevation would be parallel to the sea level.

Q. And all points on a contour line are supposed to be of the same elevation?

A. Yes.

Q You were asked a question by Mr. Beach with reference to drawing a contour line through pits 35, 2, 3 and 15: I ask you if that would be possible.

A. It would.

Q. What are the elevations in these different pits through which contour lines could be drawn showing the demarcation between artificial and natural.

A. I should have to qualify my previous statement. It could if those elevations of those pits were the same.

Q Are the elevations of those pits the same?

A. No.

[fol. 601] Q. So that could you draw a contour line from pits 35, 2, 3 and 15, representing the line of demarcation between natural and artificial fill?

A. You could not, as I find it.

Q. In drawing contour lines 247, the most northerly on Exhibit 54, and 247.5, the second most northerly on Exhibit 54, have you followed in general any recognized principle of drawing contour lines either as you have described or otherwise?

A. I have.

Q. And what are the determining points, and what is the principle which you followed in drawing those two lines?

A. The northerly one, marked 247, is shown to go through Pit Number 20, and its position in an easterly direction is made to conform with the slope as obtained from Cross-Sections A-A, B-B, C-C and D-D.

Q. So that while there is only one pit in line 247, you have followed the other data in the other pits lying in the other direction, principally at the south and the southeast?

A. Yes.

Q. So that the data on which line 247 is drawn do not constitute alone all the data rising from Pit Number 20?

A. No.

Q. Those contour lines are drawn with reference to a certain amount of difference in elevation between them, are they?

A. Yes.

Q. And what is that difference between any two contour lines?

A. .5 of a foot.

Q. So that you adopted the plan of dividing your contours into [fol. 602] differences of half a foot in each case?

A. Yes.

Q. So that the plan of the contour line was made to allow half a foot difference between any two, and you used such data as you had in the pits to cause those contour lines to be half a foot apart.

A. Yes.

Q. Now, then, with reference to contour line 247.5, which Mr. Beach, in answer to specific questions brought out did not exactly correspond with one of the pits,—Have you in mind the answer that I am referring to?

A. Yes.

Q. Now, explain how 247.5 was drawn with reference to the data in the pits?

A. It was drawn through Pit Number 2, and a little too far south. Pit Number 2 elevation between the artificial and the natural being 247.8, would cause that contour to be carried a little farther

towards the lake. It should not have gone exactly through Number 2, but should have been carried a little farther out.

Q. Will you indicate in pencil where, in your opinion, that contour line, in order to have a proper relationship to Pit Number 2, should be.

A. (Witness marks map.)

Q. You have now marked a pencil line running from a point in contour line 247.5, just west of Pit Number 2, and in a general line east of the pit in the direction of 247.5, a contour line which in your opinion represents a proper level with the rest of the contour line so far as the data in Pit Number 2 are concerned?

A. Yes, sir.

Q. You have been asked the question a number of times as to that [fol. 603] contour line being subject to correction because of an excavation made in Pit Number 20: you have in mind the question to which I refer?

A. I have.

Q. You heard the testimony of Mr. Gray, that in places the ties were dumped in two or three or more deep?

A. Yes.

Q. Did you go down below the first layer of ties which you struck in excavating Pit Number 20?

A. No.

Q. Do you know how deep down there might be other ties in that pit?

A. I do not.

Q. And your line and your data with references to Pit 20 are founded on the assumption that there is no deeper excavation or any more ties below there, are they not?

A. Yes.

(By Mr. Beach:)

Q. Then if you throw 247.5 as far north as the lead pencil line indicates, that would pretty nearly bring it to the line marked 247, wouldn't it?

A. Yes.

Q. So that following your correction which you are now making, would you not throw 247 out farther north than it is?

A. I would.

Q. Now, where would you put that?

A. About parallel with 247.5.

Q. But you are bringing it back to Pit 20 because of what you found in Pit 20?

A. Yes.

Q. Now, that would fetch 20 considerably farther south than the corrected line 247.5?

A. Somewhat farther south.

Q. Quite a distance south isn't it,—a material distance?

A. About forty-five feet.

[fol. 604] Q. And you have already testified that these contour lines would naturally be more or less paralled with the lake shore?

Mr. Oviatt: He said that the contour lines were more or less parallel with the lake shore as he drew them.

Q. You drew them more or less parallel with the lake shore in all cases?

A. Only generally, if other determinations fixed them.

Q. So that disregarding Pit Number 20, you would naturally expect those contour lines to run more nearly parallel with the lake than you have indicated.

A. Throwing out Pit Number 20, then 247, you have to produce if farther out.

Q. Where would 247.5 run with reference to 35, under that situation.

A. If I assume 247.5 at the same slope as it was, 248 or 248.5, then 247.5 would go practically parallel with the shore line as represented on this exhibit.

Q. And your 247.5 is made with a dip below Pit 20 because of what you found in Pit 20, isn't it?

A. I don't know what you mean by below.

Q. I mean south of it.

A. That is determined by interpolation between 20 and 21.

Q. Taking 20 as one of the bases?

A. Yes.

Q. Assuming that an additional pit was dug below the natural soil, would that be the true and correct basis, taking that assumption, below the natural sand.

A. Those contours were based on observations in those pits.

Q. Assuming that in Pit Number 20 the ties that you found were [fol. 605] laid below the natural surface, this assumption is based upon such observation as you might have, would that be correct from which to draw a contour line on this map?

A. Not if the natural surfaces were different from what is represented here.

Q. Now we have No. 35 indicated as 248.

A. Practically.

Q. And that is about equally distant from the water line as 20?

A. Yes.

Q. We have No. 2 almost in a direct line, which according to your notes, is 247.8?

A. Yes.

Q. Wouldn't you naturally expect to find the contour line from 35 through 20 to 2, to be 247.8? Wouldn't you naturally expect that?

A. On a shore of equal plane you would expect they would run that way.

Q. In other words, if you had left out pit 20 and drawn these contour lines, such contour lines would have been substantially parallel with the west edge, would they not?

A. I would say so.

Q. So that the distortion in the contour lines and the curve is based upon what you found in pit 20?

A. Not wholly, because that distortion is also carried out as indicated between 21 and 22.

Q. It is very largely a result of what you found in 20?

A. Yes, in the vicinity of pit 20, but you find the same distortion as determined between 21 and 22 and contours 248.5 and 249.

[fol. 606] Q. And the contour line just north of pit 3 does not mean to indicate what you found in pit 3, does it?

A. No. Pit 3 would be between the contour northerly and southerly.

Q. Did you hear Colonel Gow's testimony?

A. Yes.

Q. Your notes and his disagreed as to the level of the natural soil of those pits, did they not?

A. Yes.

The Master: As to the motion to strike out what have you to say to that?

Mr. Beach: I still move to strike out those two lines as based upon a mistaken condition of facts as to pit No. 20, which, as it appears, was dug below the natural elevation at the time the ties were put in, and no account was taken of that fact by Mr. Ferguson in making his measurements as to the supposed artificial fill; and as now appears that that not being the correct representation of the natural soil; that these two northerly lines are drawn upon an erroneous basis of fact.

The Master: It seems to me, Mr. Beach, that the evidential value of this contour line, in so far as it is based upon conditions found in pit No. 20 is sufficiently established by cross-examination and by re-direct examination to make it unnecessary to strike out the exhibit.

Therefore the motion will be overruled.

Exception to Mr. Beach.

[fol. 607] (To Mr. Oviatt:)

Q. In pit No. 20, as far down as you went, did you find the artificial fill?

A. I did.

Q. Did you find any subsoil of the character of the gray sand which is indicated on the other cross-sections in that pit at all?

A. No.

Q. And you are not prepared to testify as to how far the artifial fill may go below the ties which are disclosed in pit No. 20, if it goes below them at all?

A. I am not.

Mr. Oviatt: That is all.

(To Mr. Abbot:)

Q. I show you a sheet prepared by you representing trench No. 20. Does that sheet purport to go below the level between the artificial and the natural fill?

A. As far as I was able to determine.

Q. But you simply went to the ties, did you not?

A. A little below the tops of the ties.

Q. And no layer of natural fill is shown by that pit, is there?

A. No sir.

(To Mr. Beach:)

Q. Those ties extended beyond the sides of the test pit which you dug?

A. Yes.

Q. On both sides?

A. On both sides, and the ends.

Q. So that in order to get them in, the hole to put them in would have to be much larger than the test pit?

A. Assuming that——

Q. Assuming that they were put in the hole, it would have to have [fol. 608] been a much larger opening than the test pit?

A. Yes.

(To Mr. Abbot:)

Q. Now I call your attention to the testimony of Mr. Gow, in regard to pit No. 2——

Mr. Sutherland: What page?

Mr. Abbot: Page 285 of the typewritten record.

Q. At that place, as you will observe from that testimony, Mr. Gow notes a difference from the elevation sheet drawn by you which dexcribes the material in trench No. 2, as you observe it?

A. Yes.

Q. Will you read into the record your observations as to the contents of trench No. 2?

A. On the northerly end the surface is 250.5, top soil from that to 250.1. Yellow loamy sand from that elevation to 248.4; and clayey sand from 248.4 to elevation 247.8, which is the elevation of the dividing line between the artificial and the natural as I determined it—247.8 being the dividing line between the artificial and the natural, as I determined it. Below that elevation, coarse sand and streaks of organic matter, and water at elevation 246.0. On the southerly end the top of the surface is 250.5, top soil from that elevation to 250.2, yellow loamy sand from 250.2 to elevation 248.4, clayey sand from 248.4 to 247.9, which elevation, 247.9, is the dividing line between the artificial and the natural as I determined it. Below 247.9 to 246.1 is coarse sand, with a small layer of organic matter.

[fol. 609] Q. This sheet which I show you representing trench 2 correctly indicates the data which you have read?
A. It does.

Mr. Oviatt: Indicate on the record that counsel is referring to plaintiff's Exhibit No. 19.

To Mr. Beach:

Q. You disagree with Mr. Gow who said that artificial fill was above 247.8 in pit 2?
A. Yes, if that is what he gave.

Frederick Vaughn Abbot, a witness produced in behalf of the plaintiff, being first duly sworn, testified as follows:

To Mr. Abbot:

Q. Your full name is what?
A. Frederick Vaughn Abbot.
Q. You are a graduate of West Point?
A. I am.
Q. Class of 1879?
A. Yes.
Q. You graduated first in the class?
A. I did.
Q. And you remained in active duty in the Corps of Engineers until May, 1920?
A. I did.
Q. Did you hold the temporary rank of Brigadier General during the war and retired later as Colonel in the Engineers Service in May, 1920?
A. I did.
Q. Now taking up your service, did you serve as Assistant to Major Ernst on the Mississippi River for two years, from 1882 to 1884?
A. Yes, with a slight interruption, when I was in charge of a boundary survey between Maryland and Virginia, occupying a few months.
[fol. 610] Q. What was the nature of your work with Major Ernst?
A. Assistant.
Q. What did you do as assistant?
A. The first year, I inspected engineering work in progress in the District. The second year, I was in charge of the improvements in the vicinity of Foster's Island under Major Ernst.
Q. Whether or not that involved the removal of sand bars in such a way as to improve navigable depth?
Q. That was the object.

Q. Whether or not in connection with that work you had occasion to study the effect of flowing water upon sand and sand bars?

A. The whole time.

Q. Where was your next station?

A. At Fernandino, Florida, under Colonel Q. A. Gilmore.

Q. What was the nature of that work?

A. The deepening of the ocean bar to the entrance of Cumberland Sound by means of contracting the flowing water coming out from the sound on the ebb tide, by means of artificial tide jetties.

Q. Whether or not that work involved the study of the action of wind and wave upon sand and sand bars, in removing sand?

A. To study and carry out continuous surveys to determine changes as they occurred.

Q. What was your next?

A. At Charleston, South Carolina.

Q. In what year did you go to Charleston, South Carolina?

A. In 1895.

Q. Was it not 1885?

A. 1885, I should say.

[fol. 611] Q. How long did you remain at Charleston?

A. In the vicinity of thirteen years.

Q. What was the nature of your work at Charleston?

A. Very similar to that at Fernandino, with the addition of a number of river improvements.

Q. At the beginning at Charleston, you served as Assistant to General Gilmore?

A. I did.

Q. Were you at some time placed in full charge of that work?

A. At the time of General Gilmore's death I was placed in charge of the Charleston, South Carolina, district, which was created at that time, it having been a sub-district under General Gilmore.

Q. In what year did General Gilmore die?

A. My impression is 1887.

Q. Will you describe a little more in detail the nature of your work in Charleston in which you spent thirteen years.

A. The entrance to Charleston Harbor passes between Fort *Fort* Moultrie and Fort Sumpter, and the entrance is about a mile wide, and the ebb tide water flowing out disseminates into the ocean passing out, into an area more or less fan shaped; at a distance of probably three miles from there, there was, when I first started there a bar extending more or less parallel to a line joining the ends of the V. It was not straight, but in that general direction. That bar was about sixteen miles long, and in the vicinity of one mile in width as defined by contours of ten foot depth; so that there [fol. 612] was an immense volume of sand involved.

At that time the southern entrance was more nearly parallel to the Morris Island shore and some eight or nine miles below Fort Sumpter. There was a channel coming out and then it ran parallel to the coast for a long way and broke out at the lower end of the bar. The depth down there was something like twelve feet, varying in the storms. The purpose of the jetties there was to cause

the tide that came into the harbor to go within the fan-shaped funnel, and then pass out at precisely the force which would scatter the sand without causing a new bar to form farther out; and the solution of the problem was to so adjust the jetties that the force of that current would be neither too strong nor too weak, exactly so.

Q. And you spent approximately thirteen years upon that work?

A. Yes, we were constantly surveying to see the results we were getting by the work we did in the physical construction of the jetties. Those surveys were largely made by me in person.

Q. From Charleston, where did you go?

A. To St. Paul, Minnesota.

Q. What year was that?

A. 1897.

Q. And you remained there three years?

A. About three years.

Q. What was the nature of your work there?

A. The construction of dams on doubtful foundations, and the [fol. 613] designing and construction of concrete structures, and steel sluice gates.

Q. Whether or not a portion of this work also involved the action of water upon sand and sand bars?

A. In several of the rivers of the district, other than the Mississippi, it did. And in portions of the Mississippi River in my charge it did, but not in connection with my main works, the reservoirs at the headwaters and the lake and the dam at St. Paul.

Q. So that to put it briefly, you have spent a considerable part of your life studying the action of wind and water upon movable sand?

A. Yes.

Q. In connection with other work which you have done, have you had occasion to examine test pits in order to determine the nature of the soil, and whether it was natural or artificial?

A. Many of them, in very varied localities.

Q. Outline very briefly your experience in that regard?

A. Largely examining foundations for the erection of batteries along the sea coast; for large dams, impounding immense quantities of water, where the foundation question was very difficult; and in the Philippine Islands, where my examinations were upon volcanic material. I have had to investigate foundations in all of those locations. In each case, except in the Philippine Islands, it was all important to determine whether we had an undisturbed natural foundation or a foundation partly composed of artificially deposited material.

[fol. 614] Q. Have you also had occasion in connection with your work to make maps, and to study maps?

A. Continuously.

Q. Such maps being based upon surveys?

A. Yes. Also a comparison of maps made by other people.

Q. And in connection with this case, have you examined all the test pits which have been made?

A. Every one that exists on the property in question, and the others to the westward thereof, some forty-six in number.

Q. You also examined pit No. 13, didn't you?

A. Yes.

Q. Will you state how you made that examination?

A. In the vicinity of almost all the pits there was a stake, the top of which was at an elevation given me by Mr. Ferguson. Levelling from that stake as a basis, I verified the position of a guage board in the pit. Going down in the pit, I compared the elevations of the various strata that I could see with the markings upon that guage board. In the usual case, my measurement was made on the side of the pit, and not at either end. Therefore the figures which I observed vary somewhat from those reported by Mr. Ferguson at the ends of the pit.

Q. Whether or not in making that examination, you made it before you ascertained the nature of the data which Mr. Ferguson had measured and determined?

A. The important point to determine was the dividing line between material in my mind which had been deposited in place by the natural elements, and that which had been added to it by artificial means. That I determined on my own observation, and later I checked their accuracy by Mr. Ferguson's location of the [fol. 615] various strata by having him read them to me from the top as I checked them from the pit on the readings on the guage board. The intermediate ones I merely checked from his figures, but the one marking the division was my judgment of the division, or my judgment of the middle part of the side of the pit, while his, I believe were based on similar indications at the two ends of the pit.

Q. And you made your determination of the division between natural material, material naturally deposited, and artificial fill, before you learned from Mr. Ferguson what his determination had been?

A. What his figures were. Yes.

Q. Have you checked up with Mr. Ferguson, the sheets showing the material in these various pits?

A. I have checked those sheets with Mr. Ferguson's notes; and barring possible mistakes which two men can make in comparing a large number of figures, they agree.

Mr. Sutherland: Your Honor, preliminarily to the last answer, may I have noted on the record an objection in extenso, similar to the one which I took in Colonel Gow's testimony, in order to save our rights, and an exception to your Honor's ruling admitting the testimony?

The Master: That may be noted.

[fol. 616] Q. Will you indicate with reference to each pit the line as you determined it, between natural and artificial fill, taking those pits in the following order; Pit No. 14?

A. I have a few notes, differing, or additional to those which Mr. Ferguson made as some of those pits. Shall I read those at the same time?

Q. Yes.

A. Pit 14, elevation, 246.8. Note: artificial as far as dug. Railroad ties.

Q. Now pit 19?

A. Pit 19, 247.6, artificial above, natural below.

Q. That is, the point 247.6 indicates the dividing line between the natural and the artificial?

A. That is what it marks, according to my information.

Q. Pit 13?

— Pit No. 13, 247.0. Origin of material below 247 is doubtful.

Q. Pit No. 7?

A. Pit No. 7. 247.4. In this case I took the two ends. South end, drift wood and mud to 246.9, stratified below. At the north end, stratified below elevation 247.5. The ends are so different from the middle that I took that additional note

Mr. Beach: Are those presumably to correspond with Mr. Ferguson's figures?

Mr. Abbot: They correspond in most cases. They may vary a few tenths in some places. I am getting General Abbot's independent determination of the facts, so that all the facts may be frankly put and fully stated before the court, disagreements, or otherwise.

Q. Now, pit 18?

A. Pit 18, 247.7. Remark. Fine gray sand and water worn pebbles below 237.3, drift wood sand and water worn pebbles be-
[fol. 617] low 247.3 and drift wood and sand, 247.3 to 247.7.

Q. Pit 17?

A. Pit 17, 248.3. Remark. Very much stratified from 248.3 to 246.8. Gray sand, wood and silt from 246.8 to 246.4. Elevation 248.5 to 248.8 good average for top of gray sand. It was so irregular that I could only give an average.

Q. Pit 16.

A. That note should be for 16. I didn't get the elevation and dividing line at 16, but I said what the elevation of the gray sand was.

Q. What was that?

A. That is what I observed in there. I don't know the dividing line. 248.3.

Q. Finish pit 16?

A. The remarks are, elevation 248.5 to 248.8 is a good average for top of gray sand.

Q. Whether the gray sand,—the top of the gray sand marks the dividing line between the material which you determined to be natural and the material which you determined to be artificial?

A. Having no mark with me made at the time, I am unable to state.

Q. Pit No. 15?

A. Pit No. 15, 247.9. No special remarks.

Q. Pit 12?

A. Pit 12, 246.8. No remarks.

Q. Pit 6?
A. Pit 6, 247.2. No remarks.
Q. Pit 3?
A. Pit 3, 247.8. No remarks.
Q. Pit 2?
A. Pit 2, 247.8, no remarks.
Q. 11. Pit 11?
A. Pit 11, 248.0, artificial as far as visible, to top of ties.

Q. Will you in reading these notes preface the comment which you make with the word remark, so that the answer won't read *you* [fol. 618] *make with the word "Remark," so that the answer won't read* as if you were giving a level described in the ensuing remark?

A. When I say remarks, I mean the notes which I made in the fill, and which were not covered by previous notes that were contained in the book kept by Mr. Ferguson.

Q. I was making a request in the question. I wanted you to indicate by the word "remark," interpolating it between the level that you give, and the comment which you afterwards make, because on the record it occurs to me that the level which you state may be construed in reading the record afterwards to indicate the level which you subsequently described by the remark. Now, to clarify that situation I understand that the figure which you have read in each instance in answer to the question about each pit, indicates the level which you determined between natural and artificial material?

A. At that pit?
Q. At that pit, yes.
A. Yes.
Q. And does not describe the subsequent remark?
A. The subsequent remarks are additional and explanatory.
Q. Now Pit 5?
A. Pit 5, 247.4. The remark with the previous understanding is, coarse gray sand and gravel, organic, below 247.4.
Q. Pit 24?
A. 247.5 with the remark, black sand and silt to 247.2. Gray sand mixed with vegetable matter below.
Q. Pit 23?
A. Pit 23. 248.2, gray sand and gravel below.
[fol. 619] Q. Pit 22?
A. Pit 22. 249.0, no remark.
Q. Pit 21?
A. Pit 21, 248.0, yellow sand and clayey fill above elevation 250.2.
Q. Pit 20?
A. Pit 20, 247.5, artificial as far as dug.
Q. Pit 1?
A. Pit 1, 248.7 no remark.
Q. Pit 10?
A. Pit 10, 247.0, peat and mud at 246.6 to 247.0.
Q. Pit 4?
A. Pit 4, 247.7. Remark, mud and sand 247.3 to 247.7.

Q. Pit 39?
A. Pit 39, 247.5. Remark, mixed sand and silt, 247.1 to 247.5.
Q. Pit 38?
A. Pit 38, 249.0, no remarks.
Q. Pit 37?
A. Pit 37, 248.2, gray sand and gravel below, miscellaneous fill above.
Q. Pit 36?
A. Pit 36, 249.0, no remarks.
Q. Pit 35?
A. "47.8, no remarks.
Q. Whether or not you threw out Pit No. 9, as indicated?
A. Pit No. 9 is here marked, not used, being too doubtful.
Q. Pit 34?
A. Pit 34, 247.4. Remarks, loamy sand and clay above, up to 249.4.
Q. Pit 33?
A. Pit 33, 247.6, no remarks.
Q. Pit 45?
A. Pit 45, 249.6, no remark-.
Q Pit 46?
A. Pit 46, 248.0, no remarks.
Q. Pit 44?
A. Pit 44, 249.3, no remarks.
Q. Pit 43?
A. Pit 43, 248.7, no remarks.
Q. Pit 8?
A. Pit 8, 247.4, no remarks.
[fol. 620] Q. Pit 32?
A. Pit 32, 248.7, remark: Large gravel stones in layer below 247.2.
Q. Pit 31?
A. Pit 31, 247.2, no remarks.
Q. Pit 30?
A. Pit 30, 248.8, no remarks.
Q. Pit 28?
A. Pit 28, 247.7 remark: loamy sand and clay above to elevation 248.8.
Q. Pit 29?
A. Pit 29, 294.4, remark: artificial above undoubtedly natural below up to 248, as water deposit, and possibly above, but on inclined layer, to elevation 249.2.
Q. Pit 27?
A. Pit 27, 247.7, remark: Opposite clay layer marked probably artificial.
Q. Pit 26?
A. Pit 26, 247.6, clayey layer noted as above, probably artificial, below, very coarse dark gray sand and gravel.
Q. Whether or not you threw out pits 42, 41 and 40 as being too doubtful?

A. I threw out pits 42, 41 and 40, partly on the ground that they were hard to interpret with certainty, and partly on the ground that they were beyond the region in question.

Q. In other words, they gave you no help in determining conditions upon the premises in dispute?

A. That is my point of view exactly.

Q. Pit 25?

A. Pit 25, I had no division on that pit between natural and artificial, but I had the following note, The organic material in this pit at 248.0 consists of old wood, rotten, roots, and pebbles, being two inches in diameter underlaid by thin sand layer, and a second layer or organic with a larger proportion *second layer of organic* [fol. 621] *with a larger proportion* of organic material. Above 248. the material indicates lake origin, wind moved, probably admixed with washings from the natural bluff not far in the rear.

Q. Then in that pit you marked the level between wind and water action at approximately 248?

A. 248.0.

Q. I believe that you testified that you have checked up the sheets which have been put in, showing the levels, as determined by Mr. Ferguson?

A. I did, in detail.

Q. Whether or not they correctly show the data as Mr. Ferguson observed them?

A. They do.

Q. Whether or not your observations independently made as to the level between natural and artificial material substantially coincide with those pits?

A. In my opinion, they do.

Q. Are the differences between you and Mr. Ferguson of any material significance in this case, in your judgment?

A. I believe not.

Q. Whether or not you also checked up with Mr. Ferguson the cross sections which are in evidence here, as plaintiff's Exhibit 46?

A. I did, checking him along carefully, not only with this drawing and his own book, but likewise with the cross sections showing the elevations of the material in the pits.

Q. Whether or not it correctly shows the conditions with respect [fol. 622] to natural and artificial fill, based upon the data which you have described?

A. Except in a few cases of the coloration where the draftsman has overrun the ink line which should have defined his color to the eye, it would look wrong, but you look at the drawing carefully, he has simply let his pen brush around over the edge.

Q. Whether or not it is also correct with respect to the data independently observed by you?

A. Essentially so, probably not in exact numerical accordance at all points.

Q. But for all practical purposes in this case, it is correct by both observations?

A. By both observations.

Q. What would be the maximum variation between you and Mr. Ferguson, as you recall it?

A. My impression is that we had at one point a difference as much as three tenths, at several points a difference of two tent-s, and at several others, a difference of one tenth, but I have no means of knowing below that without going over all the records again.

Q. In your opinion, those differences are so slight as to be of negligible consequence in this case?

A. They are, in my opinion.

Q. Whether or not you checked up, in a general way the delineation of the contours upon plaintiff's exhibit 54?

A. In a very general way. I did not attempt to space out the [fol. 623] contours between pits in which observations had been made; but by a general examination they appeared to be a sufficiently accurate definition to the eye of the general shape and character of the material disclosed by the pits, as being the natural surface which was covered by artificial fill. Any contour map is largely a matter of approximation, because the points generally are all they put in, and assumption must be made for all points of a contour line lying between the observed points. To that extent, any contour map is liable to be wrong; but it gives to the eye the best practical representation of an earth form which we have been able to define in engineering. No contour map is absolutely correct, and never has been.

Q. Whether or not this map indicates with sufficient exactitude for the purposes of this case, the various contours marked *up* upon it?

A. In my opinion, I would say yes.

Mr. Sutherland: I think that is what the Court will have to decide, whether that is sufficient for the purposes of this case or not. I admire the witness' accuracy of statement and evident spirit of fairness, and I don't want to criticize his answer at all, but it does seem to me that that is what Mr. Ellis must decide.

The Witness: I was only endeavoring to give the Master the small benefit of my engineering experience.

Mr. Sutherland: The factor of error is present in any contour [fol. 624] map?

A. Yes.

Mr. Sutherland: Obviously a part of it is only an inference from ascertained facts.

A. Absolutely.

Q. Whether or not in your opinion the number of pits dug upon the premises in dispute are sufficient to furnish from an engineering point of view reasonably correct contours of the division between natural and artificial fill?

A. I would say yes. It would be better if we had more points, but these I believe are sufficient to outline in a general way what the actual conditions, indicated by the pits we have, were.

Q. Are the conditions disclosed by these contours in accord with the conditions which your engineering experience would lead you to anticipate?

A. Absolutely what — would expect.

Q. From 1913 to 1917, were you President of the Board of Rivers and Harbors, of the Corps of Engineers?

A. Yes.

Q. What is that board?

A. That is a Board constituted by Act of Congress before which all new projects must be submitted before the estimates are sent to Congress with the idea of the work being conducted by the United States, the object being to exclude all work proposed to be undertaken by the United States which in the judgment of that Board, would not be a wise and proper procedure, in the expenditure of Govern-[fol. 625] ment funds.

Q. As President of that Board, did you have occasion to study a number of projects upon the Great Lakes?

A. I did.

Q. While you were in St. Paul, did you have occasion to visit and inspect various construction projects upon Lake Superior?

A. I visited and unofficially inspected a number of them.

Q. In this connection has it been your duty to give considerable study to conditions which exist upon the Great Lakes?

A. It has been my duty.

Q. Did this study include the probable effect of jetties upon sand bars, and under water sand?

A. That was the very object of the studies I made in connection with the Great Lakes Improvements.

Q. In connection with this work, did you ascertain and consider the fluctuations in water levels of the Great Lakes?

A. I did.

Q. Have you any interest whatsoever in this litigation?

A. None, except that it presents an opportunity for a most interesting engineering study, to find out what the truth has been in an intricate case.

Q. Now, in respect to lake levels, you heard the testimony given by Captain Preston, the other day, did you not in regard to the fluctuations in the level of Lake Ontario?

A. I did.

Q. To refresh your recollection, I will read into the record two or three questions and answers from that testimony.

The Master: What page are you reading from?

[fol. 626] Mr. Abbot: Page 162 of the typewritten record.

Mr. Moser: I do not understand that it is proper for one witness to refresh his recollection from the testimony of another.

The Master: I do not know until we find out what the question is. So far, he is only reading from the record.

Mr. Abbot: I am going to ask him presently whether he examined and checked up that testimony, and I want him to have the exact

testimony before him, so we will know exactly what he checked, and not simply his recollection of the testimony. (Reading:)

Examination by Mr. Beach:

Question. From your observation during the years in which you have been engaged in the work down there what can you say upon the rise and fall of the level of the lake water?

Answer. The difference in feet between the extreme height of the lake and extreme low water mark is about five and one half feet.

Question. How does that vary in a general way?

Answer. We have usually a period of seven or eight years before you get extreme high water. The gauge of the lake is located in Oswego. It is 244.5 feet over mean tide at New York. The water in the lake today is nine-tenths over what is called zero, and in the lake extreme high water is four and a half feet over that. Low water has been one foot below it, extreme low water.

[fol. 627] Question. And generally speaking, it is over a period of years, approximately seven or eight years, that this extreme variation occurs?

Answer. Yes."

Have you checked up that testimony by investigation of data and observation of natural conditions?

A. I have.

Q. What do you say as to whether that testimony is substantially correct as to the fluctuations of Lake Ontario?

A. It is substantially correct.

Q. Then the waters of Lake Ontario fluctuate approximately between what points?

A. Approximately 243.5 and 249.0.

Q. To what do the figures 243.5 and 249 refer?

A. The mean level of the ocean at New York.

Q. Now defining ordinary high water mark as that level to which waters of the lake return often enough and at which they remain long enough to mark the sphere of their influence with reasonable permanence upon the shore, where would you place that mark upon the shore?

Mr. Sutherland: I object to the question as incompetent, no proper foundation for it, and irrelevant and immaterial.

Mr. Moser: The height of the water from year to year is available from the Government records, so that it is not necessary to indulge on the speculation of any witness.

[fol. 628] The Master: I am inclined to think counsel is right about that, Mr. Abbot. I do not believe that we can get very dependable information by having this witness, competent as he is, tell us what in his judgment or opinion would be high water mark of Lake Ontario.

Mr. Abbot: I don't ask him for the high water mark, which is simply indicated by these tables which I have; but I want the element of time also, with respect to the physical effect of the waters upon the shore.

The Master: You may ask him in respect to that. You are asking him to state what is in his opinion the high water mark on Lake Ontario and not what the effect of a more or less fluctuating permant high water mark may have been on shore.

Mr. Oviatt: There is a confusion between high water mark and ordinary high water mark. The data to which counsel on the other side have referred is data relating to high water mark of no particular years. What counsel is trying to bring out is the ordinary high water-mark as computed or as estimated from these high points each year.

The Master: Do you mean that if we had before us the experience shown by the records running over a number of years of low water and high water, water ordinary or extraordinary, what this witness [fol. 629] would state from those records would be regarded as ordinary high water. Is that what you mean?

Mr. Oviatt: That is it.

Mr. Abbot: His statement rests in part only upon these records, and in part upon physical observations of various kinds.

The Master: The witness does not pretend from any physical observation or experience in this locality to know what is high water on this beach?

Mr. Abbot: I will put a question or two more and clear up that matter.

Q. General, did you, in connection with this case make various observations on or near the premises in dispute with a view of determining the physical affect of the waters upon the shore with respect to the point at which they remained long enough, to which they came often enough to register themselves upon the actual physical soil?

A. With a degree of reasonable permanence?

Q. Yes with a degree of reasonable permanence?

A. I did.

The Master: Do you mean, General Abbot, that by visiting the lake front and since you have been in Rochester, that you are able to tell by the appearance of the shore what has been the high water mark and what its effect has been upon the shore?

A. Not upon the shore, but the physical facts which I / could [fol. 630] describe, would have a very definite bearing upon it.

The Master: What physical facts have you in mind?

A. In one pit the difference in level between the wind worn material and water worn material was exceedingly evident to the eye, and that was in a pit which had never been subject to any artificial disturbance, except possibly for the eight or nine inches at the extreme top. This was pit 25, the most westerly of all pits.

The Master: What did you find in pit 25 that informed you about high water mark?

A. I found at level 248.0 a clear demarcation of material which was stratified as it would be if deposited by water, and on top of that sand which had all the markings of wind deposited sand. That would mark a point at which the lake had operated. The water deposited material, at 248, had evidently been put there by water. It might have been put higher but eroded.

The Master: How could you tell whether the material put there by water came from the north or from the south?

A. I couldn't tell, but it was put there by water.

The Master: But suppose it came from the south, then it was not put there by lake water?

A. No, but it was at a position which within reasonable time we have mapped. It was on the old Shepard Line, so that it has been very close to the lake for many years.

[fol. 631] Mr. Abbott: I will offer in evidence a graph or chart compiled by the United States Lake Survey and obtained by me from them, showing the monthly mean water levels of the Great Lakes from official records from 1860 to date, "Date" being the close of 1922.

Mr. Sutherland: Are all these lakes on one absolute level?

Mr. Oviatt: Oh no, the water is flowing down hill all the way from Duluth.

Mr. Sutherland: That chart does contain Lake Ontario level by itself, does it not?

Mr. Oviatt: Yes.

The Master: There is no objection to that, is there?

Mr. Sutherland: No.

(Whereupon the paper referred to was received in evidence and marked Plaintiff's Exhibit 55.)

(To Mr. Abbot:)

Q. I show you a table, which is a photostat copy of a report of the United States Deep Water-ways commission with respect to lake levels, and Lake Ontario, extending back with some observations, to the year 1815. Did you obtain that photostat?

A. I did, in the office of the Chief of Engineers, U. S. Army, D. C., from a book on file in the library, and available to most of the people [fol. 632] who have access to large libraries in the United States. It is a public library; that is a photostat of a page of that public document.

Q. Whether or not this report of the United States Deep water-ways Commission was a report made by your Commission to Congress as a public document?

A. It was, as I remember. I am almost certain it was. At any rate, it was a report to the War Department, and I think it was to Congress. It was some years ago.

Q. And this is taken from page 178 of that report?

A. Yes.

Mr. Abbot: I will offer that in evidence.

(Whereupon the paper referred to was received in evidence and marked Plaintiff's Exhibit 56.)

Q. Whether or not in answer to the question which I have asked and which is now under consideration, you took this table into account also?

A. Yes, together with the diagram.

Q. Whether or not you also took into consideration certain other physical data which you observed upon the shore of Lake Ontario?

A. I did. Upon the shore.

Q. What were those?

A. Along the line of the beach, I observed the level of the sand at the lowest point that it was in contact with logs of varying ages according to their appearance where they had been deposited on the beach by the action of the lake. I found eight of those logs, some much decayed, others apparently of a later date; and their position on the beach shows where they grounded, within approximate [fol. 633] limits. I took that level of the sand, the lowest point of the sand now touching those logs, because at the time the logs grounded, they were floating in the waters of the lake, and their submergence in lake water is not very widely different from their present submergence in the sand. I wanted to make an observation which was absolutely in accord with the terms laid down for me for my guidance by the counsel; therefore I took the sand,—I did not try to dig out these logs, but I took it as they were. They varied some, as one would expect. The average would indicate, there were eight of them, and the average of my observations of the actual lake sand in contact with those logs came to 248.¼ feet, I put it a quarter, because that is the average. Further than that I looked around for any other fixing marks left on the shore of the lake which would register the affects of such a permanent nature as to last from year to year for a considerable period of time. On all German rivers they have a level of rivers known as Vegetation Grenze. That is a Government level, in the German River improvements. It is that point at which vegetation succeeds in living permanently, although submerged by periods of high water, it is the limit at which vegetable life is enabled to maintain itself through the socalled changes in the river flow or the river level. I undertook to find some similar indication on the front shore of Lake Ontario. It might be the point at — beach grass succeeded in main- [fol. 634] taining itself at the top of the beach. I took levels across to a number of those points and found that it did not constitute anything which I believe to be Vegetation Grenze in reality. The sand was blowing, and the wind blown sand was coming up on the ground and the grass came up through. To avoid the interference of this wind blown sand which always occurs along the water's edge on the lake shore, I had recourse to the river, and I found that by putting my eyd down near the level of the river the day I was down there, I could see,—that was down near Shepard's Point, by getting my eyd down a reasonable distance above the water surface, I saw on the

opposite shore a quite distinctly marked line between the vegetation which was green and the sub-line of the bank, which was a different color. I set the level at exactly that level and sighting through it and then raising and lowering my tripod, got the level at the point where the level was in adjustment, that the cross hair coincided closely with this visible line marked on the opposite side of the river, and then determined, as an engineer does the level at which my instrument was placed. That gave the indication of the Vegetation Grenze in the Genesee River of 248.5. That was one observation. I decided that it looked so much like a coincidence with the other that I wanted to test it out. So I went somewhat farther up the river nearer to the Iron Works and I found a place where I could [fol. 635] set the transit in a similar way and see what was in this position on the opposite bank. I got my level adjusted so that sighting through the level the cross-hair bi-sected all three of these levels, one of which was the one I had first used lower down, another was a little farther up the river and the third was just a little ways above the bridge. There were three of these visible marks upon the landscape that gave me the basis for a level reading. I then checked the height of my instrument and it came out so close to the 248.5 that I put it down as the same. It was a fraction of a tenth. In passing my level from the lower right hand position on the east bank of the Genesee River, swinging it out by the bridge, my eye was caught at once by almost an absolute coincidence, of my level crosswise with an exceedingly distinct mark on the dolphin out in the river on which the draw bridge stands when open. On the vertical planking on that dolphin is this horizontal mark practically the whole length. The upper part of the piers are very dark and below this line is a band of some lighter color and below that again is a band of very much lighter color. I accidentally got that mark by shifting my level. I tried to figure what that meant, why those three colors. It seemed that a reasonable explanation is that the upper part, which is black, had weathered for a long period of time, that [fol. 636] the second zone, between the black and the lighter color, had been exposed to the washing of water, removing some of this discoloration, and that the width of that intermediate zone would mark the difference between the level on that pier where almost every high water of the lake washes, and this upper one. It seemed to me therefore that that upper line was an extremely fair measure of the action of the lake water when it returned to that point sufficiently often and had remained there long enough in the past time to have left a permanent mark or level of ordinary lake high water. The highest levels would hardly make any mark. This was an average mark, indicating the submergence there, for a considerable length of time, but less than the lower one, which would be the mean low water.

The logs that I found were at 248¼, that being the average along the beach of indication of material which had been deposited by lake water, and that which had afterwards been put up by the wind marked a point in history, I do not know when, I do not know what year, but it was confirmatory, because lake water will not deposit

material in excess of the level of the lake at the time the material is deposited. It has got to be borne, it does not carry material up in the air to deposit it.

Then I wanted to verify this by reference to the papers he has [fol. 637] put in evidence, and I have prepared a table here which I would like to read if it would assist the court in coming to a decision on this important point, of what ordinary high water is in Lake Ontario.

Mr. Beach: We object to it. We object to his characterizing the ordinary high water mark. There are records of the Government, showing what the levels of the water were at various periods of time.

The Witness: From those records I am taking what I believe to be ordinary high water.

Mr. Moser: I object to the answer and ask that it all be stricken out as incompetent and wholly speculative. The witness cannot, by developing a theory testify to the height of the water in a locality at some time when he has not seen the water and measured the water. The whole answer is therefore incompetent and I ask that it be stricken out. It is a well known fact to all of us who live in this vicinity that in times of high water which occur at least once in every year, and sometimes several times a year, the level of the water in Genesee River at the point which he has described is at least a foot above the level of the water in Lake Ontario. That is, if you stand on the pier between the river and the lake the water will be a foot higher up on one side than it is on the other, so that his river marks bear no relation to the height of the Lake.

[fol. 638] The Master: All this is argumentative.

Mr. Moser: Precisely. It is all argument. His theory is argument, and it cannot be evidence. When the lake washes up on the shore in the time of storm, it will perhaps wash fifteen or twenty feet above the level of the lake, and whatever was washed up on dry land would stay there after the storm was over, washed up by the action of the waves, and not by action of the water; so that his whole theory is argumentative, and not evidence; and is wholly speculative, and I ask to have it stricken out on that ground.

The Master: I am going to let it stay in for what it is worth.

Mr. Moser: Now then, about any inquiry from this witness with reference to the documents which have been put in evidence, as to the height of the water in various years. It speaks for itself, and it is incompetent for any witness to testify as to conclusions that he draws as to what is ordinary high water when the document itself shows what is high water, and where high water comes each month in the year for a period of years.

Mr. Sutherland: It seems to me that Mr. Moser has called attention to one very obvious fact, and that is this, that it is an unwarrantable assumption where a log rests on sand is where it would be gently deposited, laid as a babe in a bed, in time of still water, instead of being [fol. 639] cast back upon the beach, any distance, in the time of flood or storm, as Mr. Abbot's log would be left, farther and farther up on the shore.

The Master: I think we will save time if we let it go in.

Mr. Sutherland: We take an exception, Your Honor, to the admission of the evidence and the denial of the motion to strike out. Now we have another question that has not been analyzed. He said he had a table that he wanted to read. We may want to object to that.

The Master: But the point we have reached in this examination is the question that was put awhile ago to Mr. Abbot and which was deferred for a time. Now do you want to go ahead with that?

Mr. Abbot: I would like to have the General put in the facts which he has collated simply from this table here, because, as I understand it, these facts, so collated, are one of the bases upon which he proposed to base an answer to my question. (To the witness:) Is that correct?

The Witness: That is correct.

The Master: Go ahead.

Mr. Sutherland: What he is going to read is under our objection and motion to strike out?

The Master: Yes.

The Witness: This is a table in which the monthly elevation of [fol. 640] the water with respect to Lake Ontario was near to or exceeded 248.0, from 1837, to 1922, inclusive. In the year 1837 it exceeded that elevation in the month of June for about one month. In 1838, it exceeded that level in the months of May, June and July, for a period of about three months. In those two years it therefore had reached that level for an aggregate period for a period of four months in the two year period. The next time it reached that level was in 1853, in the month of June, for about a month. In 1857 the lake reached that level in August for one month, and also in 1858 the lake reached that level for the months of May, June, July, August and September, October, November, and December, and January, 1859, making nine consecutive months in which the lake was at or above that level. In 1859, it again arose in April, to a height above that and remained at that height during May, June, July, August and September, thus making in three years, 1858, '59 and '57, a period of sixteen months within a period of three years during which the lake had reached the level of 248.0 or above. The next entry is in 1861 when, for four months, May, June, July and August the lake reached and maintained a level above that. In 1862 it reached that level in April, May, June, July and August, making five months that year. In 1863 it reached that level, in May and June, two months. In 1864 it reached that level in June, 1 month, making in that period [fol. 641] of four years, twelve months in four years at which the lake was at or above that level. In 1870, for four months, April, May, June and July the lake was at or above that level. In 1876 for the months of May, June and July, three months, it was at or above that level. In 1883, it was at or above that level in July, one month. In 1884 it was above that level, April, May and June, three months. In two years there were four months that it was above that level. In 1886, four months, April, May, June and July, it was above that leve-. In 1887, for two months, May and June, it was above that level. In other words, it was six months above that level in two

years. In 1890, it was above that level in June and July, two months. In 1908, for four months, April, May, June and July, it was at or above that level. In 1913, in the month of June it was above that level. That is the exact level. If I extend my limit down one half of one tenth, or 247.95, I get the additional figures, in 1838, in September, 247.98; in 1840, in June, 247.96, in 1853 in July, 247.96, in 1870, in August, 247.97, in 1908, in August, 247.96, in 1913, in May, 247.98, in 1916, in July, 247.95, in 1919 in June, 247.95; making an additional eight months to the previous list, or in all, sixty-eight months during that period of time from 1837 to 1919, in which the lake was at that level or above it.

To Mr. Abbot:

Q. Now with respect to your statement of what you observed with respect to the vegetation in the river, you used the word "vegetation." [fol. 642] Did you mean land vegetation, or water vegetation?

Q. I mean the mark on the shore at which land vegetation is unable to stand submergence by reason of the rising water and again its subsequent subsidence.

(To Mr. Moser:)

Q. May I ask one or two questions in reference to that table. General Abbot there has been no time since 1913 when the lake has reached the level 248, has there?

A. 1913, June.

Q. For a period of ten years it has not reached level 248?

A. I think that is correct.

Q. And only once in that year?

A. Yes.

Q. At one period in that year it did reach that level for a few days?

A. In 1916 and 1919, it came then.

Q. Just answer my question.

Mr. Abbot: Are you conducting the cross-examination?

Q. From 1890 to 1908, a period of eighteen years, there was no time when the lake reached the level of 248?

A. The table speaks for itself.

Q. I am asking you if there was any time in that eighteen years from 1890 to 1908——

A. That is right.

To Mr. Abbot:

Q. Now, General, coming back to the question which I put to you [fol. 643] previously. Now, defining ordinary high water mark as that level to which the waters of the lake return often enough and at which they remain long enough to mark the sphere of their influence with reasonable permanence upon the shore, where would you place that mark upon the shore?

Mr. Moser: We object to it as before, as wholly speculative.

The Master: I will let him answer it.

Mr. Moser: We object to it as incompetent and speculative and take an exception.

A. Between 248.0 and 248.5, with preference to 248¼.

Q. General, when you were upon the premises the other day with me, did you observe a red fence at the westerly end of the property in dispute?

A. I did.

Q. Now that red fence, as I am informed represents the westerly line of the property in dispute?

A. Yes.

Q. Taking the pits east of this line, at what level was the water borne material deposited against the shore or beach?

A. In the vicinity of 247.0 to 247.5.

Q. Then the general level of this water borne material——

Mr. Moser: The same objection to all this line of testimony, and an exception.

The Master: Yes.

Mr. Abbot, continuing: —at the inner side, toward the upland was between the points which you have given?

A. In general terms, yes.

[fol. 644] Q. What in your opinion caused the water borne sand to deposit, as you have described?

Mr. Sutherland: We object to that.

The Master: I think this witness is competent to answer these questions.

Mr. Sutherland: We will take an exception.

A. It is largely due to the erection of the Government Pier.

Q. Now you have observed upon this plaintiff's exhibit 54, certain contours based upon observations disclosed by the pits which show materials farther out at higher levels. What in your opinion caused deposition of those materials at higher levels?

A. The combined action of wind, waves and water.

Q. Did you find in any region or place near the premises an example of such combined wind and water action?

A. A striking example at Terry Park.

Q. Explain a little further if you please.

A. The pits that were dug are at a lower level than a portion of the sand separating these pits from the shore of the lake. Passing from the ground at the pit to go to the lake, you have to pass over a ridge, not extensively higher, but a foot or two higher, than the territory where the pits were dug, which lies at a lower level, and when I say "level" I mean a comparative level.

[fol. 645] Q. Now whether or not in your opinion the building of the jetty caused the waters of the lake to deposit their material between 247.0 and 247.5 as you have stated, out approximately to the point where the bar or ridge rises?

A. Yes.

Q. Whether or not the lake would have to remain or return frequently for considerable periods to a point above 247.0 and 247.5, in order to deposit that material?

A. In the level space?

Q. Yes.

A. Yes, it would.

Q. Whether or not that is one of the factors which you have considered in giving your definition of ordinary high water mark?

A. They are inter-related, and I have considered this as a physical indication. Not as a quantity but as a physical relation.

Q. Let me ask you, General, did you fully complete your answer in regard to the water borne material in pit No. 25, do you recall?

A. I read the note as I had it copied from the note I made at the pit.

Q. Whether or not you determined the level of the water borne material in that pit to be substantially 248?

A. I did, and so testified.

Q. Whether or not in your opinion the water had to remain for a considerable time above that level in order to deposit that material at that point?

A. Absolutely. How much above, I don't undertake to say.

Q. Now have you in some of the maps put in evidence, observed [fol. 646] a condition similar to the condition which has been disclosed by these contours, namely, the existence of a marsh, with a higher ridge of sand outside?

A. Two of the earlier maps contain exactly that indication. One that is called the light house map, and the other, Captain Maurice, in 1829, the basis of his survey in 1828. Those, I think, are in evidence.

Q. Now you have stated that the light house map and the Maurice map of 1829, which are in evidence in this case, present a condition where there is a marsh divided from the lake by a ridge of sand of more or less prominence.

A. I did.

Q. Now you find according to these contours, do you not, that after the building of the jetty another marsh divided from the lake by a higher ridge of sand was formed, under the new conditions which existed after the jetty was built?

A. That is plainly indicated by the pits, and the contours represent visually a general indication to the eye of what can be learned by examining the pits individually.

Q. Then whether or not the building of the jetty has simply produced a repetition of a condition which had previously existed, but at a point farther in-shore, namely; the production of a marsh with a higher rising bar of sand between it and the lake?

Mr. Sutherland: We object to that. The evidence shows that this so-called second marsh was caused by an inflow into the sound that had been formed by natural accretion, of a stream.

[fol. 647] Mr. Abbot: I withdraw the question.

Q. Now if the lake deposited material at or about the level of 247 to 247.5 for a considerable distance out from the shore, and then the waters of the lake fell below that point, where, in your opinion, would the wind tend to heap up the sand, for example, as you have testified at Terry Park?

A. Very similar to the condition at Terry Park. Wherever a large area of lake sand dries out on the beach winds with a northerly or westerly charcteristic would have a tendency to heap the sand up at that point or near by.

Q. Whether or not you would anticipate from the conditions disclosed by the pits and the other data in evidence, that a ridge of sand would be formed north of the old shore line a considerable distance, after the jetty was built?

Mr. Sutherland: You mean southerly from the shore line?

Mr. Abbot: North.

Mr. Sutherland: You mean the wind would blow the sand back into the lake?

Mr. Abbot: No.

A. That would be probable.

Q. Whether or not the ridge so formed would tend to move southward toward the old beach or shore, would it tend to remain more or less permanently where formed?

[fol. 648] A. That is to- theoretical to discuss intelligently.

To Mr. Oviatt:

Q. General, I show you Exhibit 46, and I ask you at what level the waters of the lake would have to be in order to submerge the natural formation and the natural land so far as section A-A is concerned, and so far as that portion of section A-A is concerned as lies north of the Finley line and out to pit 18?

A. The outer portion, 248.8.

Q. Now if the waters were at a level of 248, what portion of the natural land disclosed by section A-A would be submerged?

A. Up to a little more than that southward of pit 18.

Q. So that the whole area from the Finley line north to pit 18 would be submerged with water at 248?

A. That is true.

Q. How long a distance would that water, or how wide would that water be at 248 from the Finley line to where the land would emerge from the waters north of the Finley line?

A. About six hundred feet.

Q. And how wide would the ridge be to the north of this body of water?

A. About a hundred and forty feet.

Q. So that there would be 140 feet of ridge out from the water's edge at the land side, with an intervening body of water, beginning at the water's edge at the land side, to the water's edge at the ridge, [fol. 649] of some 600 feet?

A. In that vicinity. It is difficult to read this thing with my eyes with the light that I have; but that is approximately right.

Q. If the waters were at a level of 247 1/5, would this land in section A-A be submerged?

A. A very small portion.

Q. That is, there would be a small body of water just north of the Finley line, with a ridge appearing after the small distance of water north of the Finley line?

A. Yes, some considerable width, but very little height.

Q. On this Exhibit 46, it can be determined, can it not, with reference to any particular section, how wide a body of water would be between the Finley line and the ridge to the north of pits 22, 37 and 45?

A. Yes, with perfect ease.

Q. And from that chart or section map, the relative widths of the ridge of land to the north of the intervening body of water, and the width of the body of water itself lying between the ridge and the water lying against the shore can be readily determined?

A. Yes. That is on the assumption that the fill that is there now was not there then.

Q. All these questions relate to the assumption that if the fill had never been made, the lake returning to the levels to which you have testified, would have submerged the land in the manner to which you have testified?

A. Yes.

[fol. 650] To Mr. Sutherland:

Q. How far from the water's edge do you limit the action of the winds in carrying inward sand which is cast up by the lake and then becomes dry?

A. I did not limit it; but the operation starts near the outer edge and is constantly inland, depending upon the height of the ridge.

Q. Will you give us now as generous an estimate as you are willing to, on the distance in land that sand would be carried by the winds and deposited?

A. No, I cannot. I am not sufficiently familiar with this country personally to know. On the South Atlantic Coast, I could give you a very clear guess.

Q. Now, General Abbot, you know, do you not, of the action of the sand at West Lake, directly across Lake Ontario from Charlotte?

A. I do not.

Q. Have you never read of that action there?

A. I have not.

Q. Would you be surprised if I told you that the sand formation on the north shore of Lake Ontario is such that sand dunes have been formed, and have grown north on the land to such an extent that entire farms have been covered with sand, and the farm houses have been covered with it; that the sand marches inward to a depth of thirty feet or more for a long way landward? Would you say that was unthinkable?

A. Not at all.

[fol. 651] Q. You wouldn't be surprised, then if you found upon investigation that lake sand upon the shore of Lake Ontario forms

and is blown inward, so that for a long distance back of the shore line you have sand thirty feet deep, and that farms that were once arable and fertile have been completely covered by that incoming sand, and that buildings on those farms have been entirely covered with this sand formation?

A. The question is so long that I have missed the first of it, but I should be greatly surprised to see that happen near Charlotte Harbor.

Q. I am speaking now of what the wind can do with lake sand. Now do you think that is an impossible phenomenon?

A. I think with the proper proportion of wind and wind direction, exposed beach, and other factors, but it would not appear to apply to the case in point.

Q. I would rather you wouldn't argue the matter quite so much. I have a very great respect for your experience and ability; but you say that your experience with lake sand is not so great as that on the sea coast, perhaps, that most of your life has been concerned with. Did you hear Captain Preston state as to the piling up of the sand at Sodus? Were you present in court when he described the piling up of the sand there, west of the pier that has been erected at Sodus Harbor?

A. I am familiar with facts similar to that. His explicit testimony I do not remember as clearly as I should want to.

[fol. 652] Q. Do you remember how he described *how he described* the piling up of sand about the willow trees that were growing there, as banks of snow?

A. I don't remember that particular testimony. I heard it, but I have heard a great deal of testimony since.

Q. Do you remember the fact that he said they put up snow fences to prevent the sand covering the pier, and blowing into the harbor?

A. That is a very common thing to do.

Q. Is it inconceivable, General, that in periods of low water and high wind, the sand from the beach would be blown backward as Captain Preston described it, as the wind blows the sand, so that you would have a constantly increasing increment of sand back from the water line, resulting from the action of the wind?

A. Growing from the front, going over the top and growing toward the shore?

Q. Blowing in landward, yes. From the water's edge and from the beach, blowing back, and increasing the height of the land already out of the water?

A. That in the rear of the ridge?

Q. Yes, in the rear of the ridge, or on top of the ridge?

A. That would be quite natural.

Q. Now how far do you want to say would be the point at which there would be no increment to the land, owing to the influence of the winds upon the sand as I have described?

A. I could not approximate a scientific answer to that question.

[fol. 653] Q. You wouldn't wish to say then that if the wind had increased the height of the land back of the shore by carrying the sand in——

A. Land back of the shore?

Q. Landward from the water's edge,—Don't let us misunderstand each other.

A. I don't understand where you are asking me right now, which land you are speaking of, is what I am trying to get at. At the present time there is a ridge on the main land here, separated by a low interlying territory, and I don't know which of those surfaces you are referring to.

Q. I am referring to the land which is south of the edge of Lake Ontario, at any time that you may conceive, I don't care what year it is; but I am asking you to say how far back of the water line of the lake, how far south of the water line of Lake Ontario, you are willing to admit the wind would carry sand from the shore?

A. No engineer would risk his reputation on betting on a thing of that kind, when he doesn't know the force of the wind, or the width of the beach, the condition of the weather before the wind took place, or any of the other circumstances connected with it. That would be a mere wild assumption, to undertake to define a limit in feet or in yards or in rods.

Q. That is a fact. So you wouldn't wish to now say how far back of the edge of Lake Ontario the wind would carry sand?

[fol. 654] A. No, not feet and inches. At Terry Park, it certainly has, a very small distance, as we all know. That is in this immediate vicinity, and might afford a basis for an indefinite guess.

Q. Is the sand on the lake shore similar in nature and content to the sand on the shore of the sea?

A. I have not examined it with reference to its chemical constituents. I don't know whether this is like South Atlantic sand or not.

Q. Now as soon as the sand becomes compact as it lies, it is subject to the action of the wind, no matter how far back of the water line the sand is lying?

A. Yes.

Q. So sand that might be blown back upon the beach a rod or two in one storm might be carried still farther back in another wind storm?

A. Certainly.

Q. And as that sand keeps accumulating from the water, you have material which is capable of being carried back a step at a time, if you wish, by relays, for an indefinite distance away from the water?

A. From the northward to the southward, in this case, do you mean?

Q. That is right.

A. That is true.

Q. So how much of a deposit may have been made in that method you can not tell, unless you have the experience of people who actually observe it from year to year, as the time goes on, can you?

A. Actual observations of what happens are always better than deductions of what must have happened.

Q. Now, if from 1850 down to the present time you have had [fol. 655] structures on a sand beach, people living in them, not

submerged by the water, you wouldn't say that where those structures existed, those places were subject to periodical inundations from the lake, would you, if it never happened?

A. If it never happened, certainly they were not inundated.

Q. But actual experience is better than any theory that may be devised, without the benefit of that actual experience?

A. I thoroughly coincide with that.

Q. Will you take a look at this picture of the Spencer House please. Would you hazard an opinion now, as to whether that is lake sand that you observe in the foreground of that picture?

A. It looks like it. I don't recognize the house and I don't recognize the locality.

Q. The house isn't there. That is the Spencer House which was burned July 9, 1873. It is not now in existence.

A. Barring the house, it looks very much like a piece of the front beach.

The Master: That house was burned down about 1879?

Mr. Sutherland: Somewhere along there. It stood way back.

The Master: And before there was any fill made by the railroad?

Mr. Sutherland: Yes. It stood about where the old McIntyre house was before that was put up.

Q. In making your assumption as to the level of the lake as defined by markings on the dolphin you have assumed that the water [fol. 656] of the river would not be appreciably higher than the water of the lake?

A. I have known that it would be higher. Just how much higher it is not possible to say, without knowing many more of the physical factors, which are not in my possession at the present time.

Q. Do you not know that the water of the Genesee River is subject to very high rises?

—. Undoubtedly. You would not have water power here if it wasn't.

Q. Are you aware of the fact that the run-off of the Genesee River is said to be the most rapid of any stream in the northwestern part of the United States?

A. I have not investigated that.

Mr. Sutherland: I think that is all I want to say, General Abbot.

To Mr. Poole:

Q. General Abbot, you were testifying to counsel in regard to certain levels of the lake, 247, 247.5 and 248. You did not take into account in your answers as to what land would be submerged by any storm on the lake, did you?

A. I don't quite understand you, what land you mean?

Q. What land in question here, would be submerged in storm? I mean you did not take into consideration the action of a storm on the sand, in your answers to counsel's question, as to what would be submerged; but were speaking of water that was quiet?

A. I was referring to that map, under the questions asked by counsel, if the lake rose to that level, what would mark the line of the rear beach and what would be detached.

[fol. 657] Q. But did you take into consideration in your answers what would be the effect of storm pushing back the sand?

A. I did not.

To Mr. Oviatt:

Q. A storm would submerge more land, wouldn't it?

A. It might do all sorts of things.

To Mr. Poole:

Q. A storm would also push back the sand, would it not?

A. Yes.

To Mr. Beach:

Q. You have never seen a heavy storm down there, to see the action on the sand, and the gravel as it works on the beach?

A. I have not been present during a heavy storm in that locality.

Q. Now referring to this so-called high water mark that you have testified to, you have given in the period since 1837 sixty-eight months in which it has exceeded 248?

A. According to the records on the diagram.

Q. That was since 1837?

A. Yes.

Q. Now, have you estimated the number of months during that period out of which you carved those sixty-eight months?

A. No.

Q. In other words, it is 826, is it not?

A. In that vicinity, it depends upon whether you take up to 1923 or 1919. It doesn't come up to that, since 1919.

Q. Now in that eighty-two years, multiplying that by twelve, [fol. 658] you get 948 months?

A. I don't doubt that, Mr. Beach.

Q. Going back prior to that time, and according to the sheet which has been put in evidence, while there were no levels taken every month, yet that sheet does indicate that they were taken during certain months of the year during 1815 up to the year 1827 inclusive?

A. Yes.

Q. Was there any time during that period when it reached 248?

A. I did not examine that, because it was in fractions.

Q. Look at it now, and see.

A. I don't see any there now indicated. They have only sporadic observations, and you cannot base a study on mere sporadic observations.

Q. But they were taken during certain months of those years prior to 1827?

A. Yes.

Q. So that adding those years on, if you will permit me to make the deduction correctly, it was 1104 months out of which you have carved heretofore the altitude of 247?

A. If that is correct, I do not doubt your calculations.

Q. You have given 248, or something like that, as the ordinary high water mark, but that is very much higher than the average mark during the period of time that you have given?

A. Unquestionably.

Q. How much higher?

A. That can be figured from the figures, depending upon whether it is mean lake level, or the mean high lake level as mentioned, or the absolute lake level.

[fol. 659] Q. But taking first the chart prior to 1859, would that indicate that for periods of years there was no time when it was much above 247?

A. Unquestionably.

Q. And taking the chart from 1860 down to 1919, or 1923, as you say, it also shows periods of years when it did not exceed about 247?

A. Unquestionably.

Q. And it shows sporadic times when the mark went above 248, but separated by periods of years?

A. It has a more or less cyclic variation, and I was asked from these tables to figure which I could reasonably say was the ordinary high water.

Q. But you wouldn't call it high water or the ordinary level of the water if the level of the water during the period from 1860 to 1923 was much below the 248 mark?

A. Well the mean lake level is below the extreme level in all cases, but the mean lake level is not always below the high water in particular years. There are certain low water years when High water is below the mean level.

Q. And the mean level is what?

A. That I haven't here.

Q. Now take the period for the years 1864 to 1867, it did not exceed 248?

A. These figures have been scratched out.

Q. So that between those years, there are, between the middle of the year 1864 and the middle of the year 1867 or thereabouts,—it was below 248, and at the *un*most, 247 and perhaps six or seven tenths, is that true?

A. Yes.

[fol. 660] Q. And for a part of that period it was down as low as 245 and perhaps six tenths?

A. Yes.

Q. Now in 1867 it went above 248, and then it dropped down so that for a period of substantially three years it was only a little better than 247 at any time?

A. Exactly, as shown on the table and as I read.

Q. And very much lower than that, going down below 245 at one period?

A. Yes.

Q. And then we go from 1867 to 1876 during which it exceeded 247 only once, for a period of two or three months?

A. In accordance with the table already put in that appears to be true.

Q. Between 1870 and 1876 the water was at the highest point, something over 247?

A. Yes.

Q. And then it jumped in 1876 up above 248?

A. Yes.

Q. And then for a period from 1876 to 1883, it was above 247 only once?

A. That is right.

Q. And that was in 1882?

A. Yes.

Q. And in 1883, it just reached 248?

A. Yes.

Q. And then it dropped during some of the months at the latter part of 1883 and the beginning of 1884 down to below 247 quite a distance?

A. Yes.

Q. How far below?

A. To 246.5.

Q. And then from that low point it worked up?

A. To the annual high level.

Q. To a higher level above 248?

A. Yes.

[fol. 661] Q. For a period of a month or two as you have stated?

A. Yes.

Q. And then it dropped in 1884 down to a point below what?

A. Below 246.

Q So that for the period prior to 1884, there was but one instance for eight years when the water line was above 247.5 and that one instance was in 1882?

A. According to this diagram. That is what I am discussing, this diagram before me.

Q. Are you taking this as correct?

A. I am taking this as what you are asking questions on.

Q. If you are going to question it, I will take this one, exhibit 55, which shows the months at the top of the chart, which were not shown on the other one?

A. We have got to 1882. There was 1883, it was up to 248.

Q. Now in 1884 there was one point for two or three months when it exceeded 248?

A. Yes.

Q. Then it dropped down in the month of,—about June, would you say?

A. Somewhere along in June or July.

Q. And it dropped down rapidly, so that in the month of what?

A. The first of October, about.

Q. In the month of October, it was about 246.2?

A. I guess that is a tenth, isn't, or one-half a tenth, yes.

Q. Then there were two short periods in 1886 and in 1887 when it went up to 248?

—. Yes.

Q. Then it gradually dropped down for two or three years?

A. For a couple of years, nearly three years.

[fol. 662] Q. Now we come to 1891, and from 1891 to 1894, the water level was at its highest in 1893 and then it exceeded 248 by about four tenths?

A. Yes.

Q. The rest of the time it was down to 246, or in that vicinity?

—. In that vicinity, yes.

To Mr. Abbot:

Q. General, the testimony you have given was based upon the exhibit before you and is subject to any errors which may have occurred in reading that exhibit in this light, is it not?

A. Yes.,

Q. You have simply purported to state what you read?

A. Yes, I have read as well as I could in the poor light, a diagram of which I did not know the authenticity.

To Mr. Beach:

Q. Now, the ordinary high water mark which you have testified to, you have arrived at that from this Government chart alone?

A. It is hard to say what a man would have done. I looked for and found what I was looking for namely, indications of reasonable permanence on the ground. I then examined records to see whether I had got something which was evidently wrong, and the records confirmed my belief that I had the reasonable proximation from marks on the ground of what could not be called anything but the ordinary high water mark; not extreme high water, not extreme low water, but ordinary high water.

[fol. 663] Q. Judging from those charts showing periods of many years when it did not exceed 248 and when it went way below that by a number of feet, two feet in many instances, and the average is way below 247 ever since 1815, would you after observing conditions on the ground place the ordinary mark at 248? Just answer that question, if you can?

A. I cannot answer that question because it is not what occurred. I was looking to see whether I was wrong, and the records accorded with what I had determined the marks as being reasonable.

Q But points at 248 were spread apart a very many years?

A. Yes.

Q. And occurred only eight or ten times in the period since 1815, according to those charts?

A. That is true, they appear in groups at times, at times sporadic, as shown by my direct examination.

Q. And you have already stated that those are above average high water?

A. It is different from the mean, being something like one foot.

Q. You stated that you didn't know the mean lake level?
A. I am not sure.

The Master: You understand, Mr. Beach, that the witness is regarding ordinary high water as entirely different from the average depth of the lake?
Mr. Beach: Yes.

The Witness: The term ordinary was one defined for my information and I investigated that high water which was covered by the definition given me for my guidance.
[fol. 664] Q. I understand in your opinion if it turned out under the definition indicating that, there were certain marks left there by high water it would not describe the condition of water which was anywhere near the average, you would not say it was an ordinary thing for the water to be at the so-called ordinary high water mark, would you?
A. That question is very involved.
Q. Ordinary means something that occurs frequently?
A. It means something that is not an extreme occurrence to my mind. Others might differ. It is that is usual.
Q. If a thing occurs sporadically over periods of six or eight years, and then perhaps two or three times every two or three years, then another period of six or eight years when it does not occur, would you not call that sporadic?
A. Considering a period of one hundred years, no, divided into one year yes.
Q. You could not consider a period of one year, under my assumption?
A. Ordinary. It would be extraordinary to occur in that period of little length, but in 100 years I think it accords very well.
Q. But you wouldn't call it ordinary when it only occurs eight or ten time over a period of 100 years, would you not call that extraordinary?

Mr. Abbot: You haven't got data that goes back to 1815.

Q. Well, since 1837, if it occurred that number of times, would it be extraordinary?
[fol. 665] A. I wouldn't say extraordinary. I would say ordinary. That was my definition as indicated by my answer. A thing which occurs sixteen times is not exceptional.
Q. You spoke of a height of water at 247.2 near the Finley line and Mr. Oviatt spoke about a large body of water in there. How deep would that water be, according to this sketch No. 46?
A. That line there is 247. What was the height you gave?
Q. Mr. Oviatt assumed 247.2?
A. That is the one right on that side. It would be just a little wet at this end, and the horizontal lines are blurred. I could not say what the depth would be.
Q. It would be wet apparently?
A. Very uncertain, but it would be wet.

Q. Providing the organic material had not settled?
A. On this representation I have been discussing absolutely what is indicated.
Q. In that organic matter, did you find cat tails, and such things?
A I did not identify any cat tails in the decayed material. It was pretty well decayed.

To Mr. Oviatt:

Q. The data to which you have testified as appearing upon Exhibit No. 55 is data with reference to completed surveys and monthly means, is it not?
A. Yes.
Q. A monthly mean means the average for the month?
A. Yes.
Q So that no data are necessary to show during that month the monthly mean indicated on the diagram?
[fol. 666] A. Quite sufficient here to set forth the number of times; so that the number of times it was above added together equal the number of times it was below, not the period of rapid change; it might make considerable difference.
Q. So that in no place on that map is high water mark——
A. As high as it would be if it was recorded by days instead of monthly means.
Q. It means that in each case on this diagram where the high water is given for any particular month, the water during that month rose higher than that month?
A. In every case.

To Mr. Beach:

Q. How do you figure that, because they average?
A. Because they average for the month, and the average is always between the extremes. The only case where that would not be would be where the lake remained at the same level for the whole month. In every other case there has got to be excesses.

JOHN N. FERGUSON, a witness recalled in behalf of the plaintiff, testified as follows:

To Mr. Abbot:

Q. When you and General Abbot examined these various pits, did you give to him the level of the various stakes?
A. Yes sir.
Q. Beside the pits from which the materials in the pit were taken?
A. Yes sir. I levelled from the pit and set the gauge.
[fol. 667] Q. Did you do that correctly in each instance?
A. I did.

To Mr. Oviatt:

Q. General Abbot testified to various conversations between you. In checking over this data in all these processes, did you correctly report to him the data which you had?

A. I did.

[fol. 668] JOHN FERGUSON, being duly recalled to the stand, testified as follows:

Direct examination.

By Mr. Abbot:

Q. Mr. Ferguson, on the premises in dispute which lie east of Lake Avenue did you observe a sidewalk at the outer edge of the property?

A. I did.

Q. A cement sidewalk?

A. I did.

Q. Where does this sidewalk lie with reference to the Beach?

A. Inside, southerly.

Q. Does the sand come up to it in a good many places?

A. To a curb or sea-wall that's just on the outside or northerly side of the sidewalk.

Q. Did you measure the beach at that point simply for the purpose of indicating in a general way the width of it down to the water?

A. I did.

Q. What was that width?

A. It varied.

Q. Well, about what, if you recall?

A. At the easterly end, outside the wooden piles or timbers that are on ends, 25 to 35 for a distance of about 184 feet westerly from the pier. Then, in front of the sea-wall, westerly from that from the piles, it was about 50 feet wide in line with Pits 15, 16 and 17.

[fol. 669] Q. Then, further down where the sidewalk is how wide was it?

A. It varied from 160 feet to 185, 186 feet.

Q. How long was this wooden bulk-head next to the pier that you refer to, the bulk-head that stretches east and west, in other words?

A. The westerly end was about 184 feet from the pier.

Q. And how long was this sea-wall which you speak of which lies just to the west of that and runs down, does it not, to about the point where the sidewalk begins, that is, taking the points east and west?

A. If I remember rightly, it is about where the granolithic sidewalk begins.

Q. Yes, that's what I mean.

A. About 480 feet in length.

Q. And from that point, running east and west, this granolithic sidewalk that you refer to goes how far?

A. I don't know, I didn't measure it, but it extends—the granolithic sidewalk extends nearly to the westerly limit of this area in question.

Q. That gives me what I wanted to know. And along the outer edge of that granolithic sidewalk did you observe a little wall something like a curbstone that projects up 7, 8 or 9 inches?

A. Yes, for nearly the whole length of the sidewalk, I mean.

Q. So that all along the edge of the beach that edge is practically defined by some artificial structure, is it, that is, first by this bulk-[fol. 670] head, then by the sea-wall, then by the sidewalk, that is the edge of the sand?

A. Yes.

Q. Now, were you present on that day when General Abbot was making his observations as to the logs and the vegetation line and so on?

A. I was.

Q. What did you observe as to where those logs lay on the beach.

A. They were pretty well up on the beach and scattered for—those on which observations were taken were scattered from 700 feet in length of the beach.

Q. Now, when the observation of the vegetation to which the General has referred was taken did you observe approximately at what point on the river bank that was taken, how far south of Beach Avenue?

A. The first point was about 300 feet southerly from Beach Avenue.

Q. And I'm speaking very approximately, approximately opposite or a little south of Pit 15, was it not, or somewhat south?

A. Yes.

Q. Somewhat south of Pit 13?

A. Yes.

Q. Now, where was the next station where the three points were all observed and the line on the pier or the dolphin?

A. That was located southerly from Beach Avenue adjacent to the bank of the river about 1,200 feet south of Beach Avenue.

Q. Whether or not this was slightly north of the bridge?

A. It was.

Q. Of the railroad bridge?

A. Of the railroad bridge.

[fol. 671] Mr. Abbot: I think that's all.

(To Mr. Sutherland:)

Q. Where were those logs located which you mentioned a moment ago?

A. On the beach.

Q. At what point?

A. In front of Terry Park and westerly of Terry Park.

Q. In front of Terry Park and west, how far west?

A. About six to seven hundred feet from the westerly limit of Terry Park, I should think about 600 feet at the extreme.

Q. Did you have to dig down to find those logs?
A. No, sir.
Q. They are still in the sand there?
A. Partly, partly in the sand.
Q. They are imbedded and stationary?
A. Yes.
Q. You marked them in any way?
A. No, sir.
Q. Are there other logs there which are similarly situated which you observed?
A. I think there were, I think there are.
Q. How did you happen to pick out the particular ones that you took your measurements on?
A. The General picked those out.
Q. Were you there when he did it?
A. I was.
Q. Are the others located similarly in relation to the edge of the water?
A. In general, they are.
Q. Are any of them further inland?
A. I think not.
Q. Are any of them out further towards the water?
A. There may have been some.
[fol. 672] Q. In other words, you don't mean to say, then, that these logs that you took your observations on were lying in a parallel line, parallel with the water's edge?
A. They do not.
Q. Some are nearer and some farther from the water?
A. Yes.

Mr. Abbot: I think that completes our case, your Honor, reserving the right to check up some of the statutory citations and put in a few matters of that sort. At least, that's all that occurs to me at this time. If we have overlooked anything I would like to reserve the right to add it, but that's substantially our case.

(To Mr. Abbot:)

Q. Of course, the width of the beach would vary with the level of the lake, would it not?
A. Yes.
Q. And about what was the level of the lake when you took your observation?
A. The level of the lake was about 245.1, referring to mean tide, New York City, and the date was September 29th, 1923.
Q. Did you also measure the width of the beach opposite Terry Park?
A. I did.
Q. That is, from the vegetation line substantially down to the water?
A. I did.
Q. On this same occasion?
A. Yes.

Q. What did you find the width there to be?
A. About 190 feet.
Q. That is somewhat wider than you found it down below?
A. Yes.
Q. Opposite the premises in dispute?
A. Yes.
[fol. 673] Q. But at Terry Park the line which you measured was simply the natural grass line, and opposite the premises in dispute you measured up to the granolithic sidewalk, or the bulkhead or the sea wall, as the case might be; is that correct?
A. Yes, that's correct.

Mr. Sutherland: Now, Mr. Abbot, you have no other witnesses?
Mr. Abbot: No.
Mr. Sutherland: That you intend to call?
Mr. Abbot: I have no other human witnesses that I think of at the moment. This substantially completes our case.
Mr. Moser: Why don't you rest, then.
Mr. Abbot: We rest.
Mr. Sutherland: Except that you want to put in some documents.
Mr. Abbot: Well, I may want to put in some statutory citations, and so forth, but, as I said to his Honor, if I find I want to add anything I want to reserve the right to add it. We are not very particular in this case, as I understand it, about the precise line of demarcation between evidence in chief and evidence offered later.
Mr. Moser: We are more particular than you are. You haven't been very particular.
Mr. Abbot: Well, we had somewhat a commingling on the first hearing, Mr. Moser.
Mr. Beach: I understood the statutory acts of both the Common-[fol. 674] wealth of Massachusetts and New York would be considered in evidence.
Mr. Abbot: Yes. I simply wanted to call attention to the precise location of that, that was all.
Mr. Sutherland: We are not sure, your Honor, whether under the practice a motion for a nonsuit is in order, but to let us reserve our rghts we make a motion at this point for a dismissal of the complaint upon the ground that the Commonwealth of Massachusetts has not made out any case; that on the proofs as in, given by the Commonwealth, the title is not in the Commonwealth of Massachusetts to any part of the lands in dispute. We would like to have it understood that at this point we make a motion for a dismissal of the complaint because of the insufficiency of the proof to show any title in the Commonwealth of Massachusetts to any of the land in question. I don't know that that motion is in accordance with the procedure which we should follow in the case but we wish to make that motion, reserving our rights in that respect.
The Master: If we take it up later, why, we will take it up in a nunc pro tunc way.
Mr. Sutherland: Yes, sir.

WILLIAM C. GRAY was thereupon recalled to the stand as a witness and testified as follows:

Direct examination (to Mr. Sutherland):

Q. In reading over your testimony, Mr. Gray, there are various references to Beach avenue, and I hope to differentiate now be- [fol. 675] tween old Beach avenue and the new Beach avenue, so that in giving further testimony, whenever you refer to Beach avenue will you please state whether you mean old Beach avenue or new Beach avenue? Then there won't be any opportunity for any misunderstanding?

A. Yes, sir.

Q. You spoke of a swamp, the body of which you said was reached about three hundred feet south of Beach avenue, and I understood you to mean three hundred feet south of the present Beach avenue.

A. Beach avenue, yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Your testimony was to the effect that from that point three hundred feet south of present Beach avenue, going north, you first met with or traversed a portion of the land which was somewhat wet, that is, just north of what you said was the body of the swamp there was a section that was somewhat wet, and then you came to dry sand; that is correct, is it?

A. Yes, sir.

Q. And the dry sand, where there was no appearance of moisture, was about a hundred and fifty feet south of the present south line of Beach avenue?

A. Yes, sir.

Q. Now, from that point one hundred and fifty feet south of the present south line of Beach avenue, north to the lake, was there any swamp?

A. No swamp.

Q. That was in 1874, was it?

A. Yes, sir.

Q. When you were preparing to lay the single track?

A. Yes.

Q. For the New York Central Railroad?

A. Yes, sir.

Q. What was the condition of the land from that hundred and [fol. 676] *and* fifty foot point south of the present south line of Beach avenue, northward to the edge of Lake Ontario?

A. All dry sand with the exception of a narrow strip where the ditch or stream from Lake avenue ran eastward into the river.

Q. How wide was that water course or ditch, or whatever you're amind to call it, which you have just referred to, in 1874, when you laid your single track?

A. Why, my recollection, it would be between fifteen and twenty feet on top, and possibly four feet on the bottom.

Q. What was the character of the banks north and south of this water way or ditch?

A. Sand.

Q. Were there trees growing on either bank of that water way or ditch?

A. Yes, sir.

Q. On both sides of it?

A. No; on the north side.

Q. On the north side?

A. Yes.

Q. Was there water in that ditch or water way all the time?

A. Oh, no.

Q. Then there were times when no water was in that ditch?

A. That's right.

Q. With the exception of that ditch that you have just described, was there any land between the point a hundred and fifty feet south of the present south line of Beach avenue and the edge of the water of Lake Ontario where there was any water? Do you understand the question?

A. I do.

Q. What is the answer?

A. The answer is there might have been some spots between the [fol. 677] rifts, between the ridges of sand, that were wet, but not water; they were wet.

Q. How large an area on the average would those wet places cover between these ridges of sand?

A. Oh, just small spots, might have been two feet wide, and there might have been places five or six feet wide.

Q. But nothing bigger than a space five or six feet wide?

A. Oh, no.

Mr. Oviatt: Please don't lead the witness, Mr. Sutherland.

Q. What was the color of the sand between the point one hundred and fifty feet south of Beach avenue, and the edge of Lake Ontario?

A. Gray.

Q. Was there any fill on it at all in 1874 before you began to make your preparations for laying the single track?

A. Absolutely none.

Q. At that time the Spencer House was standing, was it?

A. Yes, sir.

Q. And you have known that land from '74 down to the present time?

A. Yes, sir.

Q. Has there ever been a time in that period when that stretch of land which I have just described was inundated by the waters of Lake Ontario?

A. No, sir.

Q. It's always been dry land from 1874 down to the present time?

A. Yes, sir.

Q. '74? Is that your earliest recollection of conditions there?

A. '73.

Q. '73. Was there any grass growing on the banks of this ditch [fol. 678] south of the McIntyre place which you have described?

A. Why, I wouldn't call it grass. There was vegetation there.

Q. What was the nature of it?

A. Well, wild vegetation, wild grass, some—Let's see, what do you call those things? I can't recall the name of that plant now but I know it is a poisonous plant. It always occurs when you open up a ditch, throw it on the side, it always grows there. Nettles, I think.

The Master: Nettles?

A. Nettles.

Q. Did you have any personal knowledge, Mr. Gray, from your own eyes, of McIntyre's digging that ditch?

A. No, I did not.

Q. That was before your personal experience there?

A. Yes.

Q. Was the water of that ditch fed from Lake Ontario?

A. No. The water of the ditch was fed from the stream coming from the south west of Lake avenue.

Q. Now, Mr. Gray, you have been through that hollow, have you, or watershed west of the boulevard?

A. Yes, sir.

Q. Through which this stream was fed?

A. Yes, sir.

Q. At times you have said there was no water running there at all.

A. Yes, sir.

Q. How great a watershed was there which contributed in time of rain to the water in this ditch?

A. Why, without absolute survey, I should say that there was in the vicinity of seventeen or eighteen hundred acres.

Q. And how far south did that watershed extend?

A. About three miles.

[fol. 679] Q. And how wide was it?

A. On an average I should say of three-quarters of a mile.

Q. So that that area with the dimensions you have described was so situated that in the time of rains or melting snow the water would run down that hollow toward the lake and then find its way into this ditch that we have spoken of and have called McIntyre's ditch?

A. Yes, sir.

Q. When you extended the single track northward was there any water in the ditch at all?

A. No, sir.

Q. When you extended your single track northward did you meet any water at any point from the old swamp that you have spoken of south of the present south line of Beach avenue, until you came to the shore of the lake?

A. No, sir.

Q. Did you extend that single track all the way to the water of Lake Ontario?

A. Oh, no.

Q. Tell the Court whether that extension was all made at one time, or whether you did it in two instalments?

A. I did it in two instalments.

Q. Where did the first extension end, so far as its northern extremity was concerned?

A. Substantially at the south line of Lot 22, which would be, I don't recall the distance, but about a hundred and fifty feet south of the present south line of Beach avenue.

Q. So that your first extension of your single track crossed the old interior swamp?

A. Yes, sir.

Q. And reached what you say was then absolutely dry land?

A. Yes, sir.

[fol. 680] Q. At a point a hundred and fifty feet south of the south line of present Beach avenue?

A. Yes, sir.

Q. Are you correct about that being lot 22?

A. The north line of lot 22, south line of lot 21.

Q. Yes. It is the south line of lot 21?

A. Yes, sir.

Q. If you said the south line of lot 22 you wish to correct it?

A. That was an error, yes, sir.

Q. Was there a time, then, that the passengers coming to the lake disembarked at that termination, that first termination of your north bound track, which you say was a hundred and fifty feet south of the present south line of Beach avenue?

A. There was.

Q. Did they build a platform there, or something to unload them on?

A. Yes, sir.

Q. How long did that terminus remain at that point?

A. Well, until the New York Central bought the McIntyre-Spencer House property in lot 21. I can't tell you in just what year that was.

Q. Well, how long, approximately, did the northern terminus of the railroad remain at this point a hundred and fifty feet south of the south line of present Beach avenue?

A. Why, I should say about five years.

Q. When was the present Beach avenue laid out?

A. 1884.

Q. So that when the terminus was fixed as you have described at a point a hundred and fifty feet south of the present south line of the present Beach avenue, the present Beach avenue wasn't laid out as a street?

A. No, sir.

[fol. 681] Q. The old Beach avenue was then in use, was it?

A. Yes, sir.

Q. Which ran from Lake avenue eastward to the Spencer House?

A. Yes, sir.

Q. Was there anything in the nature of a roadway or approach leading to this railroad terminus from Lake avenue?

A. No, sir.

Q. Was there anything along the line of present Beach avenue which was utilized at that time as a pathway or method of approach?

A. No, sir, not when this track was built.

Q. How did the people get from the terminus, the hundred and fifty foot south of the present Beach avenue terminus, down to the lake?

A. Right straight out over the surface of the sand.

Q. And in what course?

A. North.

Q. Was there something in the nature of a pathway or roadway there that was marked in any way, or did they just walk over the sand?

A. Walked over the sand.

Q. Hit and miss?

A. Yes.

Q. Was there anything during the four or five years that that terminus remained at the point you have described, in the nature of a causeway or bridge over this McIntyre ditch? Now, that's before you laid your final track running down in the lake.

A. I don't recall that; there must have been but I don't recall it.

Q. What was the condition of the pier on the western edge of the river in 1874? Was there a break in it then?

A. Yes.

Q. Through which the water of the river got into that pool south [fol. 682] of McIntyre's place?

A. Yes, sir.

Q. Where you say McIntyre kept some rowboats?

A. Yes, sir.

The Master: Judge, may I interrupt you?

Mr. Sutherland: Yes, certainly, Sir.

The Master: At what point was it that this stream or creek that came from the east, fed by the southern lands, emptied into the river?

Mr. Sutherland: Well, the map of 1872 shows that, your Honor, probably.

The Master: I thought maybe this witness would know.

Q. Can you state that? Can you tell about where the water from the stream that you have described, which made its way northward in this hollow west of the boulevard, crossed Lake avenue and got into the McIntyre ditch, about at what point?

A. Why, substantially at the north line of Beach avenue, the present Beach avenue.

The Master: Well, at any rate, it emptied into the river. Whenever the stream was high enough to contain enough water so it was higher than the river, it emptied into the river?

Mr. Sutherland: Yes, sir.

The Master: Through this McIntyre ditch?

Mr. Sutherland: Through this McIntyre ditch, yes, sir.

The Master: And when there was very little water in that creek, or whatever it was, then, the waters from the river would back into [fol. 683] this ditch?

Mr. Sutherland: Yes.

The Master (to witness:) That's the fact, isn't it?

Witness: That's the fact.

Q. That is according to your testimony, is it, Mr. Gray?

A. Yes, sir.

Q. Now, it was river water which backed up?

A. Yes, sir.

Q. When the river was higher; so that the water, seeking its level, would back up into this McIntyre trench or ditch?

A. Yes, sir.

Q. And when the river was low was there any water in the McIntyre ditch?

A. No, sir.

Q. Except, I suppose, if there was a rain storm which gathered water from this watershed, it would work its way down and out through the McIntyre ditch?

Mr. Oviatt: Now, Judge, I wish you wouldn't ask those leading questions. The witness here is asked about transactions which are fifty years old.

Mr. Sutherland: Yes.

Mr. Oviatt: And all answers consist largely of, "Yes," or "No," you describing the situation to the witness. I think that's improper.

Q. Mr. Gray, what is the fact as to where the water went when the river was low but there was a sudden downpour of water, rains?

A. It went through the ditch into the river.

[fol. 684] Q. Now, did that ditch lead into that pool or basin that was formed where the break in the pier was?

A. Yes, sir.

Q. You stated the dimensions of that pier in your former testimony, according to your recollection at that time?

A. Yes.

The Master: Judge, may I interrupt again?

Mr. Sutherland: Yes, certainly.

The Master: Would you mind bringing out whether or not that so-called break in the pier was made for the purpose of taking care of this water, and, if so, when that pier break was closed?

Mr. Sutherland: Yes.

The Master: Because there isn't any break there now.

Mr. Sutherland: Yes, sir.

Q. Do you know how the break in the pier occurred, Sir?

A. I do not.

Q. Do you remember when it occurred?

A. No, sir.

Mr. Sutherland: I don't think anybody, your Honor, has any idea that McIntyre broke the pier; I don't think so.

Q. How wide was the break in the pier?

A. Why, quite a width; I should say a hundred and fifty feet, all of a hundred and fifty feet.

The Master: Well, when was it closed?

Witness: It was closed about 1890, I think, when the Government repaired the old pier; I think it was about 1890.

The Master: It was closed, was it, after the fill was put in by the railroad?

A. Yes, sir; after those tiles were put in, the double string of [fol. 685] tile.

Q. Now, Mr. Gray, do you remember whether the pier before the break occurred had any spaces in it or under it through which water could make its way into the river?

A. Why, yes.

Q. From this ditch?

A. It was a crib pier, filled with stone, plenty of space.

Q. The terminus of the railroad remained four or five years at a point a hundred and fifty feet south of the present south line of Beach avenue, and then was extended farther north, was it?

A. Yes, sir.

Q. In the meantime was the Spencer House standing?

A. Yes, sir.

Q. Did you participate as an engineer in the second extension of that single track?

A. No, sir.

Q. Who took charge of that work, do you know, as an engineer?

A. I can't remember that.

Q. Did you assist in any way in the extension of that single track to the north?

A. No.

Q. When the single track was extended the extension crossed the McIntyre ditch, did it not?

A. Yes, sir.

Q. And at what point was the corssing made for this single track?

A. At what point?

Q. Yes.

A. It was a direct extension of the tangent leading from the south.

Q. So that the line already established for the track which ended at the terminus and fifty feet south of the south line of present Beach avenue, was continued without changing the course, continued without changing the course, continued straight toward the lake, was it?

[fol. 686] A. Yes, sir.

Q. Now, at what point with respect to the pier did that single track cross the McIntyre ditch?

A. It was west of the pier; I can't give you the figures. If I had a map I could tell you.

Q. Have you a map showing that now?

A. Yes, sir.

Q. Let's get the approximate distance from the west pier. (Witness is shown Defendants' Exhibit 8.) Now, that's the balloon track. I am speaking about the single track, you know.

A. Yes. Here is the single track right here (indicating on the map.) About four hundred and eighty-five feet.

Q. The single track, as extended northward from the hundred and fifty foot terminus, was about a hundred and fifty feet west——

A. Four hundred and eighty-five feet.

Q. Four hundred and fifty feet west of the pier line, was it?

A. Four hundred and eighty-five.

Q. Then it did not touch the pool back of the Spencer House, caused by that break in the pier?

A. No, sir.

Q. It passed to the west of that so-called pool?

A. Oh, yes.

Q. It did cross, however, what we are calling the McIntyre ditch?

A. Yes, sir.

Q. Now, I'm interested to know how the ditch was crossed by the railroad.

A. How did it cross?

Q. How did it cross, what was the construction?

A. The construction? What we call the foundation was made of old ties put in cob house fashion, and with heavy stringers resting [fol. 687] on top of them, and then the railroad itself on top of the stringers.

Q. Now, a cob-house is a culvert, is made of ties and timbers?

A. That's the way we made that one.

Q. So that you constructed there a wooden culvert,—not you constructed, but the railroad constructed a wooden culvert?

A. Yes, sir.

Q. Under which the McIntyre ditch could flow, and over that culvert the extension of the railroad was built?

A. Yes, sir.

Mr. Oviatt: Judge, I don't want to interrupt you continuously, but I think you ought to desist in your leading questions.

Mr. Sutherland: Well, I am not conscious of leading the witness, your Honor.

Mr. Oviatt: Well, I am objecting to a habit of mind then.

Mr. Sutherland: Well, it is a habit of mind rather than any intent.

Q. Describe to the Court the construction that was made over the timber culvert which you called a cob-house, at the point where the single track railroad crossed the McIntyre ditch.

A. As I say, the abutments,—what would be in railroad parlance an abutment, was made of ties, and they were placed, as I say, cob-house, that is, a layer running east and west, and then another layer running north and south, building it up to a sufficient height [fol. 688] to put the timbers on, and then the ties and the rest of the rails.

Q. How wide an opening under this timber culvert was left for this McIntyre ditch?
A. Why, as I recall it, about six feet.
Q. How much?
A. About six feet.
Q. And how high up from the bottom of the ditch did that opening extend?
A. Well, I should think six feet.

The Master: Judge, would it disturb you if I asked the witness a question?
Mr. Sutherland: Certainly not, sir.
The Master: What is the distance between old Beach avenue and the present Beach avenue, in feet, from the north line, say, of the old Beach avenue to the south line of present Beach avenue?
Witness: On what particular line, Judge? On the line of the old track or the new track? It varies, runs different directions somewhat.
The Master: Beach avenue?
Witness: Yes. (Refers to map.) About four hundred and ninety.

Q. From center to center?
A. Well, I am trying to read this scale,—about four hundred and five feet.

The Master: Four hundred and five feet from the center?
Witness: No; from the north line of the old Beach avenue.
The Master: To the south line——
Witness: Of the new.
[fol. 689] The Master: Four hundred and five feet?
Witness: Four hundred and five feet.

Q. Now, is that right?

Mr. Moser: Does he mean between them? He says from the north line of the old to the south line of the new. That includes the two streets.

Q. It includes the two streets. Now, what measurement did you take, Mr. Gray?
A. Right straight across through the center.
Q. Is it from center to center, or from outer edge to outer edge?
A. No. It is from the outer edge to the outer edge, and from the north line of old Beach Avenue to the south line of the New Beacon Avenue, about substantially through the center of the plot.
Q. What is the distance?
A. Four hundred and five feet.
Q. Now, is that measurement taken about where the single track was extended?
A. Yes, sir.
Q. I wish you to describe now what fill, if any, was made on the north and south bank of the McIntyre ditch at the points where

you say there was constructed this wooden culvert. Now, what was done in the way of overlaying that culvert with ballast or other material, and connecting it with the higher land to the south and to the north.

A. Well, north of the ditch an excavation was made for the track and the surplus material was drawn southward and put up against the abutments.

Q. Now, how much of an excavation was made in the land north of the ditch for the purpose of laying the foundation for the single track?

[fol. 690] A. Why, as I recall it now, something on an average of about a foot.

Q. And that surface sand was drawn southward and placed about the abutments at the creek?

A. Yes, sir.

Q. Or ditch?

A. Yes, sir.

Q. How far northward, now, was the single track extended? How far north of the McIntyre ditch did that track go?

A. Well it went pretty close to the outer ridge, north ridge of the lake.

Q. Well, don't try to be too close.

A. I can give you an estimate of it.

Q. Let's approximate the distance between the new terminus of the single track and the water's edge.

A. Why, about five hundred feet.

Q. Well, did the single track go west of the Spencer House?

A. Oh, yes, sir.

Q. So that extension of the single track was made while the Spencer House was standing?

A. Yes, sir.

Q. Did that extension cross old Beach Avenue?

A. Yes, sir.

Q. Now, I want to call your attention to what I am asking you about. The enlarged, second extension of the single track?

A. Yes, sir.

Q. Ended how far from the water's edge of Lake Ontario?

A. Why, I would say about seventy-five feet.

Q. So if you said it ended five hundred feet from the lake you didn't mean so to be understood?

A. You said from the McIntyre ditch, as I understood your question.

[fol. 691] Q. Well, maybe I did.

A. Yes. Five hundred feet north.

Q. It did run about five hundred feet north of the McIntyre ditch, did it?

A. Yes, sir.

Q. And ended how far from the water as it then stood in the lake?

A. I should say about seventy-five feet.

The Master: That was about 1878, was it?

Mr. Sutherland: No. The second extension was about four or five years after 1874.

Witness: I think I made a mistake when I said about four or five years; I think it must have been about 1875 that that was done.

The Master: One or two years after?

Witness: Yes, because it was before the Philadelphia Centennial, I remember that.

The Master: Well, that was in 1876.

Mr. Sutherland: '76, July 4th.

Witness: Yes.

Mr. Sutherland: That's one date we don't forget.

Witness: Yes.

Q. Then, you are now clear in your recollection that the second extension of the single track——

A. Yes, sir, was in 1875.

Q. Was effected before the Philadelphia Centennial?

A. Yes.

Q. And, of course, then the Spencer House was standing?

A. Yes.

Q. And this extension crossed old Beach Avenue?

A. Yes, sir.

The Master: And it ran from the ditch five hundred feet north?

Witness: Yes.

[fol. 692] Mr. Sutherland: Five hundred feet north.

The Master: And stopped within seventy-five feet from the lake front there?

Mr. Sutherland: The lake front, according to his recollections there.

Witness: Yes, sir.

Q. What kind of a terminus was built at this second extension?

A. No terminus except a platform for people to walk on, step off of the train and on.

Q. There was no loop there then?

A. Oh, no.

Q. So the train had to back up?

A. Yes, sir.

Q. You said that in preparation for the ballasting of this second extension of the single track there was an excavation of the top sand of about a foot in depth?

A. Average.

Q. On the average?

A. Yes, sir.

Q. What was placed in the excavation?

A. Ties and rails and ballast.

Q. What kind of ballast?

A. Gravel from East Rochester, from the East Rochester sand and gravel pit, we called it, out here toward East Rochester.
Q. The gravel for the ballast was from East Rochester, was it?
A. Yes, sir.
Q. How much was put in there, would you say, of this gravel from East Rochester?
A. Why, about a foot.
Q. Well, approximately, in cubic contents, now, for this new extension, how much gravel would you say was put in? A foot all the [fol. 693] way?
A. About six hundred yards.
Q. Were there two tiers of ties laid there, or only one?
A. Only one.
Q. In what were those ties laid, in the gravel?
A. In the sand.
Q. Were the bottom of the ties laid on the original lake sand?
A. Yes, sir.
Q. And between the ties was this gravel ballast?
A. Yes, sir.
Q That you have mentioned.
A. Yes, sir.
Q. How wide was this filling, Mr. Gray, that you have just mentioned this ballasting, how far did it extend to the right or left of the rails of the track?
A. Well, the filling was about nine feet, that's all, just merely enough to cover the ties.
Q. And it was a standard gauge road, was it?
A. Yes, sir.
Q. How long did that single track remain in that condition?
A. Until 1884.
Q. Till 1884?
A. Yes, sir.
Q. Meantime the Spencer House burned down, did it?
A. Yes, sir.
Q. Do you recall definitely the date of the burning?
A. I don't recall definitely, but I believe it was 1879.
Q. How soon after that was there another hotel built?
A. Five years.
Q. And that was the Hotel Ontario?
A. Yes, sir.
Q. During that five years was there any structure on any of the land north of present Beach avenue and east of Lake avenue and west of the pier?
A. The balloon track.
[fol. 694] Q. No. Was there any building, I mean,—any buildings of any kind?
A. I think not. Yes, there was one pavilion.
Q. Where was that located?
A. That was located on the south side of old Beach avenue, and that was torn down in the construction of the Hotel Ontario.
Q. Now, how long had that pavilion been there?

A. Why, I think it was built at the time of this Spencer House, or very soon afterwards.

Q. But not burned down in the Spencer House fire?

A. Not burned down, no, sir.

Q. Were there any other out-buildings of the Spencer House that survived the fire?

A. I don't just recall that.

Q. How big was this pavilion?

A. Seventy feet long, fourteen feet wide.

Q. Seventy feet long and fourteen feet wide? Which way was the long way, north and south or east and west?

A. East and west.

Q. Where did that pavilion stand with relation to old Beach avenue and the McIntyre ditch, so called?

A. Why, it was about sixteen feet south of the south line of old Beach avenue.

Q. And how far from the old McIntyre ditch?

A. About two hundred and fifty feet north.

Q. Now, were there trees growing about that pavilion, or in its vacinity?

A. No, not that I recall.

Q. What was the pavilion built on? What did it rest on?

A. On posts.

[fol. 695] Q. And were those posts in sand?

A. Yes, sir.

Q. Or in other soil?

A. Set right in the sand.

Q. Lake sand?

A. Lake sand.

Q. During the period after the burning of the Spencer House, and before the Hotel Ontario was built, do you know who operated that pavilion?

A. Why, it was a basket picnic pavilion, simply people came there with baskets and got in under there to eat at the benches.

Q. It was open to anybody, was it?

A. It was open to anybody, yes, sir.

Q. There was no admission?

A. Oh, no.

Q. Or anything like that?

A. No.

Q The New York Central was then in possession of the entire property, was it?

A. Yes, sir.

Q. Where did the old ferry at that time land its passengers on the west side of the river? I am speaking now of the time when the Spencer House had burned down, and before the Hotel Ontario was built, where did the old ferry land its passengers on the west side of the river?

A. They formerly landed right behind or east of the old Spencer House, and then they changed over to their present landing which is at the end of the present Beach avenue, but I can't tell in just exactly what year they changed.

Q. Well, wasn't it when the new Beach avenue was laid out?
A. I think it was.
Q. And that was laid out in what year?
A. 1884.
[fol. 696] Q. About that time the Hotel Ontario was built, wasn't it?
A. It was started, yes, sir.
Q. So that the laying out of the new Beach avenue and the changing of the landing place of the ferry and the building of the Hotel Ontario were all about the same time?
A. Yes, sir.
Q. A time of general improvement down there.
A. Yes, they. They put in the balloon track at the same time.
Q. Mr. Gray, where did the people drive their carriages in approaching the Spencer House when it was in operation?
A. Through old Beach avenue.
Q. From Lake avenue?
A. Yes.
Q. Then turned east and drove along old Beach avenue to the Spencer House?
A. Yes, sir.
Q. What accom-odations were there for horses and carriages?
A. Barns and sheds at the southwest of the Spencer House, and south of the pavilion.
Q. And how extensive were those stables?
A. They were quite extensive.
Q. What?
A. They were quite extensive. The stables were a hundred and sixty-five feet, east and west. They were in the shape of a "U," a hundrd and sixty-five feet, east and west, and the west line was about ninety-six feet and the east line was about a hundred and six.
Q. And those stables are delineated upon Defendants' Exhibit 8, are they not?
A. Yes, sir.
Q. And marked, "Stables"?
A. Yes, sir.
[fol. 697] Q. Did those stables burn when the Spencer House burned?
A. No, they did not.
Q. How long did they remain?
A. They remained until they were torn down in the general improvement in 1884.
Q. So that in the period when there was no hotel in actual operation north of Beach avenue and east of Lake avenue, the pavilion and those stables remained?
A. Yes, sir.
Q. On that property?
A. Yes, sir.
Q. How far were the stables south of old Beach avenue?
A. About ninety-two feet.

Q. And how far were——

A. Wait a minute, wait a minute. That's wrong. A hundred and twenty-two feet.

Q. And how far were those stables from the McIntyre ditch, so-called?

A. About fifty-four feet.

Q. Did you have anything to do with the preparation for laying out new Beach avenue?

A. Yes, sir.

Q. Were you employed by the village of Charlotte for that purpose?

A. Yes, sir.

Q. I wish you to describe what was done in laying out new Beach avenue and preparing for its use as a public highway.

A. I simply gave them stakes and the village foreman graded up the street and drew some slag on top of the street so as to make a hard surface for the wheels going over to the ferry.

Q. What was the character of the ground over which new Beach avenue was laid out?

A. Sand.

Q. Was there any fill of any sort overlying the sand when new [fol. 698] Beach avenue was first laid out by you?

A. Well, when they got through they had put in some filling, of course.

Q. Well, I know, but I mean when they began.

A. When they began?

Q Had there been anything overlaid on the sand?

A. No.

Q. So that you began with sand?

A. Yes, sir.

Q. When you laid out and constructed new Beach avenue?

A Yes.

Q. Was there any water in the course of new Beach avenue when it was laid out?

A. No, sir.

Q. Was it at that time that the balloon track was constructed?

A Yes, sir.

Q. Was that constructed before the Hotel Ontario was built?

A. Yes, sir.

Q. And before any of the new buildings were put on what we call Ontario Beach Park?

A. Yes, sir.

Q. And you were, as a surveyor, connected with the laying out and building of the balloon track?

A. Yes, sir.

Q. And on one of the exhibits you show where that balloon track was constructed?

A. Yes, sir.

Q. What did you do with the old single track extension?

A. We used it as a swing around to get the material to the different parts of the balloon track to save cartage, and when we completed the balloon track, took it up.

Q. Where did you begin to diverge from the line of the single track as it was then in existence, when you made the balloon track?

A. About two hundred and fifty feet south of the south line of lot [fol. 699] number 21.

Q. Well, now, you say that by present monuments. How far from new Beach avenue was it that you began to diverge from the old line of the single track, to construct——

A. About five hundred feet.

Q. Which way?

A. South of the south line of new Beach avenue.

Q. How much of a divergence, now, did you make in making your balloon track, from the old line? You diverged first to the east, did you?

A. Yes, sir.

Q. And how much of a divergence to the east did you make?

A. Well, we ran east on a curve which had a radius of substantially three hundred and twenty-five feet.

Q. So at the extreme divergence it was three hundred and twenty-five feet from the line of the second extension of the single track, to the east?

A. No, it is different from that.

Q. Well, let's be correct about it.

A. About three hundred and fifty-five feet.

Q. Toward the pier?

A. Toward the pier.

Q. What was the character of the soil?

A. Sand.

Q. Was there anything on the sand before you began to prepare to lay your balloon track?

A. No.

Q. At that point?

A. Nothing but sand.

Q. Three hundred and fifty feet east of the old single track?

A. Nothing but sand.

Q. Lake sand, was it?

A. Lake sand.

Q. When you swung around nearer the lake and to the west, did [fol. 700] you go with your balloon track farther north than the terminus of the single track?

A. No, sir.

Q. How did the balloon track correspond with the terminus of the single track?

A. About the same.

Q. Tell the Court what you did, or what the railroad did with regard to preparing its roadbed for this balloon track.

A. Assumed an elevation which would be the height of the water in the lake at that time——

Q. Well, what was it?

A. 247½.

Q. Now, what did you do?

A. Excavated to a point six inches below that height in the water and set the foundation ties for the track.

Q. You say, excavated in the water?

A. Excavated through the sand and into the water so that the ties were laying in the water.

Q. Now, at any point where you made any excavation did you begin to excavate in water?

A. No. We began to excavate in sand.

Q. Was it all sand you made your entire excavation?

A. Yes, sir.

Q. For the balloon track?

A. Yes, sir.

Q. And how far north, to the north of that line of balloon track where you made your excavation did the sand extend before you came to Lake Ontario?

A. About seventy-five feet.

Q. At the norther-most point of the balloon?

A. Yes, sir.

Q. You excavated down until you came to water?

A. Yes, sir.

[fol. 701] Q. And that would be at a depth of how much from the top surface as you found it?

A. Why, anywhere from eighteen inches to three feet.

Q. Was the top surface regular or irregular?

A. Irregular.

Q. Tell the Court how it appeared.

A. Why, it lay in ridges, running east and west, high points and low points.

Q. Do you know how long that irregularity had existed in your recollection?

A. Ever since I recollect.

Q. Did these ridges remain the same, or did they change from time to time?

A. They changed.

Q. Did you notice whether the wind blew the sand or not?

A. Why, yes, I did.

Q. What was the fact with regard to the action of the wind on the sand, as you observed it?

A. In very high winds from the north and west it would pick up the dry sand and drive it shorewards or inland.

Q. And to what an extent did you observe that phenomenon?

A. Quite an extent.

Q. So that these ridges which you speak of, which you encountered as you made your excavation, were not permanent ridges, but those that for a time were there——

Mr. Oviatt: Now, I object. If I have to object from time to time and delay the proceedings, I will object to it as leading.

The Master: I think that question is quite leading, Judge Sutherland.

[fol. 702] Mr. Sutherland: Well, I apologize.

Q. At some points you had to dig through those high places——

Mr. Oviatt: I object to that as leading.

Q. (Continuing:) —to a depth of three feet?

Mr. Oviatt: I object to that.
The Master: I don't think that is leading.
Mr. Sutherland: He testified to that.
The Master: He has already stated that at some points he dug to a depth of three feet. He is merely repeating what the witness has already said. Go ahead.

Q. But other points it was less than that?
A. Yes, sir.
Q. But your purpose was to get that excavation down to a point which you call the water line?

Mr. Oviatt: I object to that as leading.
The Master: I think that's been testified to.
Mr. Sutherland: Yes, that's been testified to.
Mr. Oviatt: Then we are wasting time.
The Master: He took the level of the height of the lake, and he undertook to get down to a point where it would strike that level.
Witness: 247.
The Master: At some points that took eighteen inches, some, three feet. It is a repetition, it has all been testified to.

Q. Now, Mr. Gray, what did you do after you got your excavation?
A. Put in a foot of material on top of that.
[fol. 703] Q. What material?
A. Sand.
Q. Where did you get it?
A. Got it up the railroad.
Q. Where?
A. South of Charlotte.
Q. What was the nature of the sand—sharp?

Mr. Oviatt: No, no, no.

Q. Sharp or soft, or what?
A. Just common everyday sand.
Q. How did it differ from lake sand?
A. Well, different in color.
Q. Land of love, there's some other difference than color.
A. Well, different in texture, too. It is sandy—There was loam in it, and the lake sand, there is no loam.
Q. This was suitable for ballast, this sand that you put in there, was it?
A. Well, not exactly for ballast, but suitable for filling on which to put the ties which were afterwards ballasted.
Q. Then, before you laid any ties, you put into your excavation a layer of sand that you got somewhere south of the village of Charlotte?
A. Yes, sir.

Q. How deep did you lay that sand that you brought in?
A. One foot.
Q. And on top of that you laid your ties, did you?
A. Yes, sir.
Q. What did you do for ballast between your ties?
A. Brought gravel from East Rochester, and some slag from the blast furnace.
Q. How wide was your ballast on your balloon track?
A. About nine feet, ten feet.
Q. And that's a standard width for ballast, is it?
[fol. 704] A. Standard width, yes, sir.
Q. And did that manner of construction apply to the entire loop?
A. Yes, sir.
Q. Was there any point on that loop where in making your first excavation you found anything but lake sand?
A. No, sir.
Q. Now, I call your attention, Mr. Gray, to the method of crossing what we have been terming McIntyre's ditch, in order to lay your balloon track.
A. Yes, sir.
Q. What was done by the railroad or the village, or anybody else, with regard to any change in McIntyre's ditch at that time?
A. The railroad put in two strings of tile, three feet in diameter, running from west of Lake avenue through to the river.
Q. And at what point at Lake avenue was the western end of these two strings of tile?
A. Ran west of Lake avenue; I can't tell you just how many feet; and then ran south to the south line of lot number 20.
Q. About how much of a distance did the tiling extend west of Lake avenue, and south, as you have described it?
A. Why, I should think about ninety feet west of Lake avenue, and about three hundred and ninety feet south of the south line of Beach avenue.
Q. Yes. Now, at what point with regard to the present Beach avenue were those tiles laid across Lake avenue?
A. Why, north of the north line of present Beach avenue.
Q. How far north of the north line?
A. Well, I don't know exactly, but I think it was about forty feet.
[fols. 705 & 706] Q. And how deep down were those tile laid?
A. Make that about thirty feet instead of forty.

The Master: What is it you are describing,—those what?
A. Tile. Q. A tile drainage, each three feet in diameter?
A. Yes.
Q. Two of them?
A. Two of them.
Q. Running side by side?
A. Yes, sir.
Q. Where the old McIntyre ditch had run?
A. Yes, sir.
Q. Now, I want to know how deep down those tile were laid, the bottom of the tile, how far down did they go?

A. Well, I can't tell you that exactly but along about elevation 243, I should think.

Q. How much of a fall was there in the tile from Lake avenue out to the river?

A. Six inches.

Q. What excavation, if any, was made for the purpose of laying those tile?

A. Excavation to the depth necessary to set the tile in, that's all.

Q. Well, was it considerable of an excavation?

A. Oh, yes.

Q. Or only a little? I want to get the fact, I don't know anything about it.

A. You mean in the depth?

Q. Yes.

A. Oh, well, it wasn't,—You see, the ditch was only about four feet wide; there was not much excavation in the bottom of the ditch, but, of course, on the sides there was more.

Q. How did the bottom of the tile as laid compare with the bottom of the McIntyre ditch before the tile were laid?

A. It was laid substantially a foot below the bottom of the Mc-
[fol. 707] Intyre ditch.

Q. What was done with the earth that was taken out for the purpose of laying the tile?

A. Put back onto the tile, over the tile to cover them.

Q. What was the nature of that earth which was thus excavated?

A. All sand.

Q. Was there any vegetable matter there in that soil that was excavated for that purpose?

A. Only in the bottom of the McIntyre ditch there was some vegetable mould.

Q. Well, describe that.

A. Why, just common, ordinary, every day vegetable mould, what we call muck.

Q. Black colored?

A. Black, yes.

Q. Did you say that earth that was excavated, and the sand, was replaced over the tile after they were laid?

A. Yes, sir.

Q. What other covering, if anything, was laid over the tile?

A. Put old ties over there.

Q. I beg your pardon?

A. Old ties.

Q. How were they laid with respect to the tile?

A. Laid across.

Q. Cross ways?

A. Yes, sir.

Q. And with regard to the extent of those ties covering the tiles, how much was it?

A. Why, I wasn't there all the while those tiles were laid, but I think they were laid the whole length of the tile.

Q. And would that be true crossing Lake avenue and west and south.

A. Y s, sir.

Q. Up to the beginning of the tile drainage?

A. Yes, sir.

[fol. 708] Q. And out to the river?

A. Yes, sir.

Q. Now, on top of the ties what was laid?

A. Sand, I suppose.

Q. If you don't know, don't attempt to say.

A. I don't know. I wasn't there at the excavation when they were putting in those tile.

Q. At the conclusion of the whole affair what was the final grade of the land where the McIntyre ditch had been, as respects the land to the north and south of it?

A. Well, that's kind of hard to answer.

The Master: Well, was it higher or lower?

Witness: It was lower, but I can't tell you just how much. The company did this work.

Q. I know. What I am trying to get at in the question is whether it was leveled up, or whether there was anything in the nature of a depression along the line of where you laid this tile when you got through with the work there.

A. Well, the surface of the ground was lower than it was on the front, that is, on the north side. How much I couldn't say, a few inches, but I couldn't say.

The Master: A few inches, do you say?

Witness: Yes, a few inches, but I couldn't say how much.

Q. Now, do you know what the nature of the overlying material was that the railroad put in along above those tile?

A. No, I don't, except what sand they took out and put back.

Q. What else they put in you are not able to accurately state?

A. No, I couldn't say.

Q. Now, I'm interested to know what crossing was made for the [fol. 709] railroad in place of the former timber culvert over the McIntyre ditch after you put the tile in? What was the construction over the tile for the railroad track?

A. The same kind of construction.

Q. Did you take out the old cribbing and put in new?

A. Well, we had destroyed—we had taken up the old straight track and had rebuilt, that is, put in a cob-house bridge for each one of the tracks of the loop, building on substantially the same plan.

Q. Now, you built that loop, then, did you, before put your tile in the McIntyre ditch?

A. Yes, sir.

Q. Then you put your wooden culvert over the McIntyre ditch for both sides of the loop?

A. Yes, sir.

Q. Where those sides crossed the McIntyre ditch?
A. Yes, sir.
Q. And was the manner of the construction of those two new wooden culverts substantially the same as the culvert for the crossing of the single track?
A. Exactly the same, except there was a wider opening.
Q. A wider opening for the ditch?
A. Yes, sir.
Q. How wide an opening for the ditch did you leave in the new construction?
A. I think they were ten feet between the abutments.
Q. Instead of six?
A. Instead of six.
Q. The old opening was six?
A. Yes.

The Master: Then you constructed the tile underneath that, worked underneath that?
Witness: Yes, sir.

[fol. 710] Q. And when the tile was laid you laid the two strings of tile under the timber culvert?
A. Yes, sir.
Q. Now, did you fill in under the culvert after you laid the double string of title?
A. Yes, sir.
Q. What did you put in there?
A. Put in the material we took out in making the excavation for the tile.
Q. Anything else?
A. Sand, right there handy.
Q. Where did you get the sand?
A. Right on the side.
Q. How much water, if any, was there in the McIntyre ditch when you laid your two strings of tile?
A. Not any.
Q. Do you know what month you laid those tile?
A. No, I don't know exactly, but I think it was September or October; it was late in the summer.
Q. And in what year, again?
A. 1884.
Q. When did you lay the balloon track?
A. 1884.
Q. How early?
A. Why, I think August or September.
Q. So that the laying of the double tile followed immediately?
A. Yes.
Q. After you got your double track in?
A. Yes, sir.
Q. Now, with reference to the laying of the double tile, when was new Beach avenue laid out and begun to be constructed by the village?

A. The same time.

Q. Was it going on at the time that you laid the double tile?

A. Yes, sir, the whole thing was done at once.

Q. At one time?

A. Yes, sir.

Q. When did the Hotel Ontario begin to be constructed?

A. 1884.

[fol. 711] Q. After you got your double track in?

A. Yes, sir.

Q. After you got your balloon track in?

A. Yes, sir.

Q. Do you know when it was completed?

A. Well, some time in the winter. I know when it was opened for business, but I don't know when——

Q. When was it opened for business?

A. Opened on Decoration Day, 1885.

Q. When were the other buildings built in connection with the Hotel Ontario?

A. Well, subsequent to the building of the Hotel Ontario; I can't tell you. They kept putting them up all over everywhere; I can't tell you.

Q. Yes, but was there not some other building put up about the time the Hotel Ontario was constructed?

A. Yes, there was.

Q. What was that?

A. Well, there was a bath house over at the northwest corner near Lake avenue. There was,—I don't know the names of all those buildings. There was a big building built east of the Hotel Ontario.

Q. East of the Hotel Ontario?

A. Yes.

Q. Hilarity Hall, was that what it was called afterwards?

A. I think possibly it was. Then there was a hotel over on the pier, where Stetson used to keep. Well, there were quite a few buildings; I couldn't tell you what they were.

Q. Well, we won't ask you to take your time for that.

A. A merry-go-round, and a few things like that.

Q. Now, Mr. Gray, I want to know how much, if any, filling in or overlaying of the sand in this area did you observe outside of the [fol. 712] lines of the railroad track and the lines of the tiling, which took the place of McIntyre's ditch,—how much, if any, overlaying of sand by other material have you personally observed except, or in addition to the lines of track and the tiling *and* new Beach avenue?

A. Well, I laid the balloon track level, that is, any point on the balloon track was level with any other point opposite.

Q. All right.

A. Of course, there was a rise in the track because of the heavy curve. With cars on it the outside of the rail would correspond with the outside of the rail on the other track, or the inside, and it was graded up to that. Now, in places, especially along the north shore,

north end, there was sufficient sand to draw to the south and fill in, level up. At the south the material had to be brought in to level it up.

Q. How far to the south was the first filling of foreign material that you saw?

A. Well, that's pretty hard to say. I should think up to the present line of Beach avenue.

Q. Which line?

A. South line.

Q. The south line?

A. Yes.

Q. You saw, then, foreign material, if I can use that expression, laid in up to the south line of present Beach avenue?

A. Yes, sir.

Q. And by whom was that done, and when?

A. By the railroad company, in 1884.

Q. Where did that foreign material come?

A. Up the Charlotte road above Marshal street, I think was where [fol. 713] they got that.

Q. What was the nature of it?

A. Why, dark sand, loam.

Q. Did they have a Borrow pit up there?

A. Yes, sir.

Q. And how extensive was that filling in south of the south line of present Beach avenue by this foreign material?

A. South of the south line of what?

Q. You said this filling in which was done by the railroadt was south of the south line of present Beach avenue.

Mr. Oviatt: He hasn't yet said that.

Mr. Sutherland: I beg your pardon, now, don't contradict me.

Mr. Oviatt: He said down to the south line.

Q. Am I right?

A. I said down to the south line of present Beach avenue.

Q. Where was the filling made?

A. Made from about half way of the curve.

Q. Now, don't use that expression, please. I want to get something that's fixed now.

A. From about starting at nothing at the south line of old Beach avenue and running then to the south line of the new Beach avenue.

Q. Yes; starting at nothing at the south line of old Beach avenue?

A. Yes, sir.

Q. And how deep at the south line of new Beach avenue?

A. I leveled it up to a foot, which would be 248.5, to correspond with the top of the track. I went a little farther than that, 248.9.

[fol. 714] Mr. Moser: Wait a moment. What did he say?

Witness: About 248.9, to the top of the rail.

Q. From east to west, how large an area was covered by that fill?

A. The ground occupied by the balloon track.

Q. Was there any fill outside of the limits of the balloon track?

A. On the east of the balloon track, filled up the basin on the river that laid north of new Beach avenue and south of the old Spencer House.

Q. Is that shown on Exhibit 8?

A. Yes, sir; right in there. (Witness indicates on the exhibit.)

Q. What was put into that area?

A. Why, any old rubbish we could get, and then sand and slag, sand taken from the same place.

The Master: What was the extent of that area filled?

Witness: I said, I guess, once before——

The Master: I maen this particular place that you filled outside of the area covered by the balloon track, what was the area?

Witness: That basin there is about two hundred and fifty by a hundred and twenty.

Q. Which was *is* the two hundred and fifty, north and south?

A. North and south.

Q. And the hundred and twenty, east and west?

A. Yes, sir.

Q. How deep was that hole that you filled up?

A. Why, I think it was possibly eight or nine feet deep.

Q. From the top surface of the general sand around there, do you [fol. 715] mean?

A. Yes, from the top surface of the general sand.

Q. How deep was the water itself in that pool?

A. About three or four feet.

Q. And that water came into that place from what sources?

A. From the river.

Q. Through the break in the pier?

A. Yes, sir.

Q. Have you told everything now that you now remember about what you put into that particular place?

A. I have.

Q. Next to the break in the pier?

A. I have.

Q. Where did you get that material from?

A. Up along the Charlotte road near Marshal street.

Q. And was that filled up then level with the adjoining earth?

A. Yes, sir.

Q. What was the character of the adjoining earth on the north?

A. The same.

Q. Lake sand?

A. Yes, sir.

Q. And the character of the earth south of the hole that you mention?

A. Lake sand.

Q. How about west of that hole, between that hole and your balloon track, what was the nature of the soil?

A. Lake sand.

Q. Nothing overlying it?

A. No.

Q. Now, on the west of your balloon track, west of the west half of your balloon track?

A. Yes, sir.

Q. Did you, at that time, or the railroad, do any filling in?

A. Not so very much.

[fol. 716] Q. Did you do some?

A. Some, yes, sir.

Q. What was the nature of it?

A. Just merely leveling off, leveling off so as to give a good grade for the water to shed, rain water.

Q. Which way did the slope go? You speak of a watershed, which way did the slope go?

A. Went to the south.

Q. What outlet was there for surface water?

A. Wasn't any outlet, went down, settled away in the sand.

Q. How much of a slope did you make there?

A. Oh, very little slope.

Q. Where did you get the material to make any fill that was made at that time, which you have described as a leveling off process?

A. Any of the sand in the front of the property.

Q. So, then, it wasn't what we have been calling foreign material that was laid in there at all?

A. I don't think so; I didn't see any go in there.

Q. Mr. Gray, in all of these operations from 1873 down to the present time, as you have described them, was any material whatsoever deposited in Lake Ontario?

A. No, sir.

Q. Was any material, after the filling up of the interior swamp in 1873, put in any place where water was standing except in the area adjacent to the break in the pier that you have described?

A. No, sir.

Q. Have you now told all that you personally know of any filling in or alteration in the surface of the lands with which we are concerned in this law suit?

A. Yes, sir.

[fol. 717] Q. Was any part of this balloon track laid on anything other than dry land?

A. No.

Q. Now, Mr. Gray, I call your attention to the interior swamp that was filled up when the first extension of the New York Central was made in 1873, was it?

A. Yes, sir.

Q. You testified about a swamp in the interior?

A. Yes, sir.

Q. That was filled up at the time the track was first extended from the old station in Charlotte until it stopped south of the present south line of present Beach Avenue?

A. I did.

Q. And you spoke about a point where the water was so deep that you had to swim?

A. Yes, sir.

Q. Now, I want you to tell us where that point was with reference to some existing boundaries, so that we will get it in our minds correctly. Take the old Cornell map, if you want to, of 1854.

[fol. 718] A. That was about eight hundred feet south of the south line of the new Beach Avenue.

(Sutherland:)

Q. How is that point related to the Finley and Shepard lines?

Q. Well, it would be 525 feet south of the Finley and Shepard line.

Q. It is part of the land included within the Finley and Shepard survey, is it not?

A. Oh, yes.

Q. And in what lots was that marsh situated under the Finley and Shepard surveys?

—. Lots 22, 23, 24, 25, 26 and 27.

Q. Any of it in lot 21?

A. A very little piece, in pretty near the west line.

Q. I want you to show the court and get it on the record just how much that little piece was?

A. A triangular piece, scaling on this map of Cornell, 66 feet east and west and 33 feet north and south.

Q. And in what lot on the Finley and Shepard surveys was this point where you say the deep water was?

A. Lots 24 and 25.

Q. How far from the edge of Genesee River was that deep place, as denoted on Cornell Map of 1854?

A. 132 feet.

Q. Was the interior swamp, which you say you filled up when the first extension of the railroad was made in 1873, similar in extent to the marsh depicted upon the Cornell map of 1854?

A. Yes.

Q. Did the marsh which you filled up in 1873 extend any farther then to the north than the marsh is depicted on the Cornell map of [fol. 719] 1854?

A. No sir, it did not. We did not fill up the marsh. We filled in a right of way across the marsh.

Q. From north to south you filled it up, did you?

A. Just filled the right of way.

Q. What remained of the old marsh, after your right of way was filled?

A. It was filled up by the Blast furnace people, by their slag.

Q. When was that done?

A. That was done for years, till they got it filled up.

Q. When was it completely filled up?

A. I don't know.

Q. Can you approximate it?

A. I think probably 1905, somewhere along there. It took a long while to do it.

Q. What did they fill it up with?

A. Just slag.

Q. About where, if you could indicate on the Cornell Map, the railroad filled up that marsh in 1873; can you give us a kind of an idea where you ran it?

A. Do you want it pencilled in?

Q. I wish you would avoid that. Can you indicate it at its north and south extremity by the distance from the edge of the Genesee river as it appears on that map?

Mr. Oviatt: Can you determine it as a distance west of the dotted line of the proposed street?

The Witness: I have a duplicate of this map with that marked on it.

Mr. Oviatt: Just give the distance.

A. 790 feet west of the pier as shown on this map, on a line between lots 21 and 22.

[fol. 720] Q. That would be the line of the railroad fill?

A. Yes.

Q. And running back from that point at the southerly edge of the marsh, where would you locate it?

A. About 165 feet on a line between 27 and 28, from the river.

Q. As delineated on the Cornell map of 1854?

A. Yes.

Q. Now, Mr. Gray, where did the water come from which fed that marsh, as you observed it, in 1873?

A From the river.

Q. Where did it get into the marsh, from the river?

A. It was all open.

Q. Where, how much of an opening was there?

A. The opening was from the division line between lot 27 and 28 to substantially the division line between 24 and 25.

Q. What distance would that be in feet?

A. That would be 720 feet.

Q. Now what was the nature of the edge of the river at that point? In that space that you have just described, where you say the water got from the river into the marsh?

A. Well, there was stone and sand and mud and slime?

Q. Did the water go into the marsh from the river at all times of the year?

A. Yes.

Q. What was the character of the vegetation, if any, growing on the edge of the river, in that space that you have called the opening from the river into the marsh, what was growing there?

A. There was some cat tails along the edges, but there was quite a bit of open water.

[fol. 721] Q. How deep was the water in the division between the marsh and the river in this space that you say constituted the opening between the two?

A. That I couldn't tell you.

Q. As related to the depth in the interior of the marsh?

A. Well, I don't know that, because I did not take soundings at the river edge; but I know how we got our center line through and how we got by the water there.

Q. You described that in your previous testimony?

A. Yes.

Q. The Cornell map is diagrammed also on Exhibit 8, is it not? A portion of the swamp here shown.

Q. As shown in the Cornell map of 1854?

A. Yes.

Q. Now, did you describe the vegetation growing in this old interior marsh, which we will call the Cornell map marsh? Have you described the vegetation in there?

A. Why it was the common vegetation as usual, in any marsh in this country around here, cat tails, and water lillies and other water plants.

Q. How great an area in this interior marsh was vegetation of the kind you describe, apparently?

A. I should not think more than one fifth of it.

Q. Was that around the edges of it?

A. Around the edges, yes.

Q. And in the interior was open water?

A. Yes.

Q. Will you tell us with your scale, Mr. Gray, if you please, what the distance is upon the Cornell map of 1854 from the northernmost edge of that interior swamp to the edge of Lake Ontario, using the [fol. 722] Cornell scale, if you will?

A. Approximately 660 feet.

Q. How far is it from the western point of that marsh as depicted on the Cornell map to the east edge of Broadway, as depicted on the Cornell map?

A. About 166 feet.

Mr. Sutherland: Now if Mr. Moser and Mr. Beach can be permitted to supplement my examination with questions of their own, with that I am content.

The Witness: I want to correct my testimony about the second extension of the single track. I guess I made an erroneous impression here. I did not build the second extension, but I gave the stakes for the Central men to build it.

Mr. Sutherland: So you were employed as the surveyor and engineer in connection with the second extension?

The Witness: Yes, but I didn't build it.

To Mr. Moser:

Q. So that you were familiar with the construction?

A. Yes.

Mr. Oviatt: Were you there every day?

A. Why not every day.

Mr. Oviatt: I object to the question as leading.

To Mr. Moser:

Q. You have told us a little about what occurred on this New York Central property?

A. Yes.

Q. During all this period were you familiar with what was tak-[fol. 723] ing place on the Bartholomay property on the north of Beach Avenue and to the west of Lake Avenue?

A. That following year I went to work and really developed that property.

Q. What year was that?

A. 1885.

Q. You did conduct the development of that property?

A. Yes.

Q. That is, the engineering?

A. Yes.

Q. At the time you were there, at the time you took charge of the development of that property in 1885, what was the character of the soil?

A. Why, it was all sandy soil, as far as I know.

Q. You have testified about Whitney's cottage. That had already been built before you began your development in 1885?

A. Yes.

Q. When you say sandy soil, what kind of sand do you mean?

A. Lake sand.

Q. Was there any evidence of any foreign sand having been put there at that time?

A. No.

Q. From the time that you took over the development of the property in 1885, has there been any of that land filled in?

A. Why there were roads built in there, for which excavation was made to get a foundation, and of course that was spread over the top; and there were tennis courts, two of them, put in there, and that material was taken out and then broken stone put in to make a foundation for that, and such other material as was excavated in making foundations for buildings was spread around and thrown out. I don't know of anything having been put in [fols. 724-727] there.

Q. Was there any of that land north of Beach Avenue and west of Lake Ontario under water?

A. No.

Q. Has there any earth been filled into the water in the Bartholomay property?

A. Not to my knowledge.

Q Has any part of the lake been filled in?

A. No sir.

Q. Now, to come back to the New York Central property again. In the territory north of Beach Avenue and East of Lake Avenue,—North of the present Beach Avenue, and east of Lake Avenue, will you tell us whether or not during any of the period from the time you were first familiar with it in 1873 down to recent times, any

earth has been filled into the water, into the lake or in any other way along in there except this pool that you have spoken of in from the river?

The Master: I think that has already been testified to. He said there was not, in answer to a question.

Mr. Moser: He did say that there was not?

The Witness: Yes.

Mr. Moser: That is all I want to know.

[fol. 728] Cross-examination.

By Mr. Oviatt:

Q. In ordinary railroad construction the track is laid somewhat above the surrounding territory for drainage purposes?

A. Ordinarily, Yes.

Q. And that is the most approved railroad construction, is it not?

A. Yes.

Q. In adopting the plan of construction at the area in question, you adopted that plan, did you not?

A. Yes and no.

[fol. 729] Q. Now you said that you assumed a certain elevation?

A. Yes.

Q. And that was 247.5.

A. Yes.

Q. And that was the elevation of your rail?

A. That was the elevation of the bottom of the sub-base.

Q. And the surrounding territory to this balloon track was somewhat lower than the track.

A. No.

Q. Now, Mr. Gray, that is a matter which is in the recollection of the great many people in this vicinity?

A. I can't help what they recall, I know what we did.

Q. Were those rails any higher than the territory and the sand that was there?

A. The rails for at least half of the area of the balloon track were below the sand.

Q. Below the sand?

A. Yes.

Q. So that the sand, when the wind blew, it blew it over the rail?

A. The sand was thrown out and leveled off under the rails.

Q. Assuming a condition of affairs subsequent to the finishing of the balloon track, were the rails above the sand or below?

A. The rails were below the sand.

Q. After it was finished?

A. After it was finished.

Q. Can you state that with due consideration that the surrounding sand, loose sand, subject to wind action, was above the level of the rails of the track?

A. For at least half of the length of the track.

Q. How frequently was this track used, after it was laid, every day?

A. Every day, yes. A good many times a day.

[fol. 730] Q. Was the second extension made upon the acquisition of the property by the New York Central?

A. That I don't remember. I don't remember when they got title to it.

Q. They did not start any construction there until after they had acquired the property, did they?

A. I don't know what year they acquired the property.

Q. You stated that they acquired Lot 21 at a certain time?

A. I know that we put in that balloon track after they had acquired it, but don't know what year they acquired it.

Q. Your first extension did not go any farther north than the south line of Lot 21?

A. No.

Q. And you made your second straight extension after they acquired Lot 21.

A. I think we did, I am not quite certain.

Q. Now considering the probabilities that the New York Central would not lay a track on another man's property, does not that refresh your recollection that they got that Lot 21 before they laid their second extension over it?

A. No, it does not, because the owner of the property might have requested it.

Q. Have you got any data to indicate when that second extension was laid?

A. I know it was the year before the Centennial.

Q. Has the New York Central any data to indicate that?

A. Not here, No.

Q. You never have seen it?

A. No.

[fol. 731] Q. You know that records of the New York Central are so kept that the exact year of it would appear?

A. No. I don't think that is so down here. Company men themselves did all this work. Mr. Weston said that he did it.

Q. You have stated that the sand which you say you excavated in was clearly Lake sand?

A. Yes.

Q. And the reason you knew it was lake sand was because it was colored up, distinguished from the other materials?

A. Yes.

Q. And one of those clearly distinguishing characteristics was the absence of loam in the lake sand?

A. Yes.

Q. And the absence of loam would indicate lake sand?

A. Not necessarily.

Q. The presence of loam would indicate that it was not lake sand?

A. Yes.

Q. So that the presence of loam would be a sufficient indication to your mind that the substance was not lake sand, wind placed, in that case?

A. Yes.

Q. Now you remember that this pool that McIntyre kept his boats in was filled with lake sand entirely, do you?

A. No.

Q. What was it filled with?

A. Filled with sand brought down from up around Marshall Street.

Q. What was the level of the bottom of that pool? Do you know?

A. No. I do not know the level but there was five or six feet of water in it.

Q. And that was filled in with foreign material?

A. Yes.

Q. Entirely?

A. Yes. I wouldn't say that either, it might have been, some of the top fill. They might have drawn some of the lake sand over [fol. 732] the top.

Q. Were any ties put in the bottom of it?

A. Yes.

Q. Was the entire floor of it covered with ties.

A. I don't think so, I don't know.

Q. And the bottom which was four or five feet below the level of the lake, was bottom as it existed after the river waters, as you say, had washed out the land?

A. Yes.

Q. And these ties were places immediately on that bottom?

A. Well, I couldn't say that. The ties were placed in against the crib, the river crib, to prevent the wash of the water, or the action of the boats throwing their waves going through the pier, pulling the sand out. Those ties were put in there, to prevent that action.

Q. Is there any pit which exists in the area covered by this pool?

A. Yes.

Q. That is pit 14, is it not?

A. Yes.

Q. And pit 14 is how far from the north line of this pool?

A. Sixty-five feet.

Q. And how far from the west line?

A. Thirty feet.

Q. Now pit 14 you have examined, have you not?

A. Yes.

Q. Tell us the dev-ation at which you found the top of the ties in pit 14?

A. It is 247.11.

Q. How thick was the tie?

A. Six inches.

Q. If they had been laid in the bottom of that pool with that four or five feet of water in it, the lake must have been up to about 251. or 252.?

A. If that had been the fact but I don't consider that those ties were ever laid in the bottom of that pool.

[fol. 733] Q. You know that they were laid somewhere up above the bottom of the pool?

A. I think they were put in for the foundation of the Scenic Railway there.

Q. So that the original bottom of that pool must have been very substantially below the bottom of those ties?

A. Yes.

Q. And what was filled in from the bottom of the pool up to the point where the ties were?

A. In this particular pit Number 14?

Q. Yes.

A. I don't know, I haven't noticed anything except just those ties on the Scenic Railway.

Q. You were not there when the filling was done?

A. No.

Q. And you do not know what was filled in that pool?

A. Well, I know where they drew the material from and dumped it out in there.

Q. Where did they draw it from?

A. Up on Marshall Street along the road.

Q. Turn to pit number 7, Mr. Gray. Did you find any ties in that pit?

A. No, I have not indicated any.

Q. What was the level of the bottom of the yellow loamy deposit there?

A. I do not seem to have that. All I have got is the old stuff, muck and roots.

Q. What is the level of the old stuff?

A. 247.86.

Q. And that is how much higher than the top of the ties in pit No. 14?

A. Nine inches, substantially.

Q. Well, you take the level of the lake water at the time that the hollow was filled in and deduct from it four or five feet for the [fol. 734] depth of that water, then you get the elevation of the bottom of that hollow, wouldn't you?

A. Yes.

Q. And you could indicate that on pit 14, so as to show how far below the bottom of the yellow diagram that bottom would be, couldn't you?

A. Yes.

Q. Now you say that in the ditch or drain you laid some three-foot tile?

A. Yes.

Q. And you have the level at which you laid that tile, haven't you?

A. No, I have not.

Q. Didn't you testify on your direct examination here to-day that you put that tile in at a certain level?

A. I put it in, Yes, and No; we used the bottom of the ditch and gave it a six inch pitch from Lake Avenue down to the River, but the exact level I haven't got.

Q. Didn't you say something about the fact that you used a level of 247.5 in connection of the laying of that ditch?

A. 247.5 was the top of the sub-base of our Railroad and tried to get it below that.

Q. So that you got the tile below 247.5?

A. Yes.

Q. How far below?

A. It was a three-foot tile. Three feet four inches below that.

Q. Below 247.5?

A. Yes, at least.

Q. So that the tile was laid in a level of at least 244?

A. Yes.

Q. And that tile was for the purpose of carrying waters from the creek to the west into the river?

A. Yes.

Q. Now the bottom of that tile, therefore, was at a level of about 244, is that right?

A. Yes.

[fol. 735] Q. And there was no water in the ditch?

A. No water in the ditch.

Q. And you had excavated about how much from the bottom of the ditch?

A. I think between a foot and a foot and a half.

Q. So that the bottom of the ditch was either about 245, or about 244.5 as it existed before?

A. Yes.

Q. And therefore while that ditch was in existence the bottom of it was about 244, or 245, at all times?

A. Yes.

Q. And the ditch was about four feet wide at the bottom?

A. Yes.

Q. And twenty feet wide at the top?

A. Yes.

Q. In your experience there was never any water in that ditch, except when the creek was bringing it down?

A. Yes, that was the only time I saw it.

Q. The level of the lake in 1884 was what? Do you remember?

A. We had all kinds.

Q. What was the lowest level that it had in 1884?

A. I don't recall just now.

Q. You don't remember them rowing up that ditch in boats?

A. I never saw that.

Q. The top of the tile therefore was at a level of about 247.5?

A. About 247.

Q. Then the bottom of the tile was 244, not 244.5 as I said before?

A. In that vicinity you said 244.

Q. And on top of the tile you put in what material?

A. The material we took out when excavating and then on top of that we put ties.

[fol. 736] Q. You have a distinct recollection, have you, that at the time the second extension was put in that the Spencer House was then standing?

A. Yes, it was.

Q. That is absolutely distinct?

A. Yes, I know that.

Q. You recall how the breaking of the pier occurred?

A. No. I do not.

Q. Were there any piles driven at the point where it broke?

A. Yes, piles put in the old crib.

Q. What is a crib construction?

A. It is a box. A continuous box made of timbers bolted together; every ten or twelve feet there of a cross section making a box; and those boxes were filled with stone. In front of them, on the river side, there were piles driven to prevent vessels from striking on the head of this crib work, and also to prevent the crib from sliding into the river.

Q. To what extent did you participate in laying the second extension? You said you participated?

A. I gave them the center line stakes and the grades, of course.

Q. That was done before they started to operate?

A. Yes.

Q. After they started to operate, were you there?

A. No. I was not.

Q. Not at all?

A. I don't know whether I was there or not. There is nothing I can recall now, that would cause me to go there. It was company men doing a company job and I had given them the stakes and the grades.

Q. What were you doing during the year in which the second extension was laid?

A. Building the Four Track railroad.

[fol. 737] Q. Whereabouts was that?

A. Just at that particular time, I was between Rochester and Palmyra.

Q. On the main line of the New York Central?

A. Yes.

Q. And when did you start to work between Rochester and Palmyra that year?

A. We started to work in 1874.

Q. No. In the year you were working the Palmyra track, at what time in that year did you start to work?

A. All of the year.

Q. And your duties kept you there?

A. Well, except the end of every month. I was in what they called the floating gang, and I had to help their subdivision engineer here, make out their monthly estimates.

The Master: Where were you living?

A. In Rochester.

Q. In laying out the center line stakes for this second extension, how long did it take you?

A. I guess maybe three hours.

Q. So that you went down there and spent three hours laying out the stakes?

A. Yes.

Q. And you don't remember going down there again until the second extension was finished?

A. I might have been down there a lot of times because the Spencer House was a place of resort, and I used to go down there, but as a representative of the company, going on the work, I can't remember that I ever did.

Q. You have no recollection now of having gone down there and having anything more to do with the second extension except three hours in laying the center line stakes?

A. That's all.

[fol. 738] Q. What was the purpose of those stakes?

A. So that they could line up their track and grade their track.

Q. They showed you not only the location of the line, but its elevation?

A. Yes.

Q. And you must have some notes concerning that?

A. I did.

Q. What became of your notes?

A. Well, all our notes were shipped from Rochester here in a box car, and the box car was burned in Syracuse, and a very large portion of the data, of the Rochester data, was destroyed at that time. I think all our notes were destroyed at that time.

Q. You said something about the fact that there was six hundred yards of gravel drawn in there for ballasting the track. Have you any idea as to that?

A. No, I just figured out what it would require in my head.

Q. Then you have taken recently the length and area of the balloon track and computed the amount of gravel that it would have taken to ballast that track?

A. Yes.

Q. And have now testified that that was the amount that was put in there?

A. Yes.

Q. So that your testimony today is based upon a conclusion as to the amount of gravel which would be required to ballast such a track?

A. Yes.

Q. And not on recollection at all as to how much gravel you drew into this area?

A. That is true.

Q. You have for the purposes of your testimony assumed that the gravel was used for ballast, and assuming that there was no other gravel used, you have testified as to the quantity drawn in [fol. 739] from a calculation as to what you in your opinion believed should have been drawn in?

A. Yes, what I would require to be drawn in.

Q. There must be some records of that in the possession of the New York Central railroad, are there not? You made reports?

A. I made reports, yes.

Q. You made reports as to the quantity of material drawn in there?

A. The roadmaster would have made any report, but it was done with company cars, and he would have done it by the train load if he did it at all.

Q. In the ordinary course of the business of the railroad, such reports would be made?

A. They would nowadays, but they would not in those days.

Q. Do you know whether they were made or not?

A. No, I do not.

Q. The old ferry which you say landed about opposite the Spencer House, landed at the Terry pier, opposite the Spencer House, did it not?

A. Yes.

Q. You have read over your testimony of the last hearing since that hearing, have you not?

A. No.

Q. Have you had it read over to you?

A. No sir.

Q. Is your testimony of today to be taken as entirely consistent and be interpreted with the testimony which you gave on the other hearing?

A. The testimony that I gave today is exactly what I wanted to testify to the other day.

[fol. 740] Q. Do you regard your testimony of today as to be taken subject to and with reference to your testimony of the other day?

A. No.

Q. In other words, you want your testimony of today to supercede your testimony of the other day?

A. Yes.

Q. And you have made your testimony of the other day the subject of some consideration with counsel?

A. Very little.

Q. You have, haven't you?

A. No. A little, I have a very little.

Q. Then you do regard your testimony today as being inconsistent with your testimony the other day?

A. I don't know. My testimony the other day was distorted testimony, and was distorted in many places by your making me say yes and no, when I didn't want to. But today I have tried to give the exact status of the affair as it happened in 1873, 1874 and 1884.

Q. Do you remember now clearly the testimony that you gave at the last hearing?

A. No, I don't remember clearly; I remember I gave testimony.

Q. Is your recollection at the present time quite good?

A. Yes.

Q. You remember clearly things which occurred in 1874?

A. Yes.

Q. And yet you don't remember clearly the testimony you gave with reference to these things two or three weeks ago?

A. I don't remember exactly as clearly as I might.

Q. Did you or did you not say the other day that you did dump ties in water other than in this pool where McIntyre kept his boat?

A. I didn't say that I dumped them in Water. I said that I [fol. 741] dumped them in wet places.

Q. You have that recollection now as to your testimony the other day?

A. I don't know what I said the other day. I know that is what it was. I dumped them in wet places. I don't remember that I ever said it was in water. I didn't dump them in water anyway.

Q. I think you stated that your fill in 1884 extended south from the north line of the old Beach Avenue?

A. Yes.

Q. And it extended farther south than the south line of the new Beach Avenue, did it not?

A. Yes, a little bit, not much.

Q. There was a ball park lying out south of Beach Avenue, wasn't there?

A Yes.

Q. And that was right out in the marsh, wasn't it?

A. I don't know. I didn't lay that out.

Q. In laying out the ball park there was a fill made immediately south of the new Beach Avenue, wasn't there?

A I could not tell you that.

Q. Nearest the town?

A. I don't remember.

Q Did you take your fill and run it to the south line of Beach Avenue and then stop right there?

A No, I ran to join the straight track. Our Balloon track diverged and we ran to that straight track, and that was the extent of the fill. That I had nothing to do with.

Q. And that ran straight south of the new Beach Avenue, didn't it?

A. Yes, 250 feet.

Q. Do you know how high your track was to Beach Avenue above the level of that locality at the time you began your fill?

[fol. 742] A. Well, I began at a grade of 248.5. It wasn't at any place more than a foot.

Q. The amount of your fill?

A. Yes.

Q. And when you say you ran it at a grade of 248.5, which part of the track did you mean?

A. The track itself.

Q. That is the upper part of the rail?

A. No, I mean the top of the tie.

Q. The top of the tie was 248.5 at Beach Avenue?

A. Yes, all through there

Q. And you filled in Beach Avenue about a foot?

A. Yes, at no place did I fill over a foot.

Q. But there were places that you did fill in a foot?
A. I think possibly.
Q. At Beach Avenue.?
A I am sure of that, because my sub-base was 247.5, for I excavated to the sub-base and I put a fill of a foot on that.
Q. You have testified that you filled in above the then area at Beach Avenue one foot, did you not? Did you intend to say that?
A. I think I said not over a foot, and we didn't go over a foot.
Q. And your testimony is to be construed this way?
A. I don't know that we went a foot. That was fifty years ago. I don't take levels,—the New York Central was doing that work with company men and I simply gave them grades, and I didn't care whether they took out one yard or a hundred yards.
[fol. 743] Q. That same hesitation about being accurate exists in all these things equally well, does it not?
A. No.
Q. Didn't you give me in figures exactly the tile?
A. That is all right. I couldn't get away from that. It couldn't be otherwise.
Q. At Beach Avenue you had a certain level or elevation before you started to build your extension for your railroad, didn't you?
A. Beach Avenue was built the same time.
Q. When you put your stakes in it for the second extension there hadn't been anything done?
A. No.
Q. So you had a fair elevation of the location where Beach avenue was subsequently put?
A. Yes.
Q. And there you filled to not over a foot, at that point?
A. Yes, let it go at that.
Q. You are the one. I am asking you?
A Yes.
Q. You understand my question?
A. Yes.
Q. And then you put in your extension at a level of the top of the ties of 248.5, is that true?
A. Yes.
Q So that we have the top of the ties and the ties and the foot filled in and within the area which was in existence in the place that Beach Avenue was subsequently laid out, am I right?
A. Yes.
Q. Do you clearly understand my question?
A. Yes.
Q. And there won't be any question in your mind at some subsequent hearing that you didn't understand this question, will there?
A. No.
Q. You are clear upon it?
A. Yes.

[fol. 744] Q. Now if you filled in for the extension a foot, and then had the top of your ties at 248.5, was the rest of Beach avenue filled up in any way to proximate the level of your railroad?

A. I don't know anything about that

Q. Do you remember whether Beach Avenue was brought up to any relationship with the top of the rails in order to afford a smooth passage across the railroad?

A. All I recall of Beach Avenue was that the village people built Beach Avenue, and they drew in slag material to make a hard surface, so that the wheels would not cut into the same. As to their grade, I don't remember just how they had it, It was substantially level all through there.

Q. All you remember is that they did make a fill and level the thing up?

A. Yes.

Q. Now how was the level of Beach Avenue, compared with the level of the land to the north of Beach Avenue at that time?

A. It was lower.

Q. Lower than this ridge outside or lower than the McIntyre ditch?

A. It was higher than the McIntyre ditch and lower than the ridge outside.

Q So that the area of the New Beach Avenue was higher than the then level of the McIntyre ditch and higher than any land between, down to the New Beach Avenue or any land intervening till you got out to the McIntyre ditch?

A. No.

Q. How far north of Beach Avenue, New Beach Avenue, as it then existed at the time you put your center stakes in for the second ex- [fol. 745] tension would you have to go till you got land which was higher than this area of the new Beach Avenue?

A. About 250 or 300 feet.

Q. So that for 250 or 300 feet north of the location of the present Beach Avenue which was relatively lower than the then surface of the New Beach Avenue?

A. Yes.

Q. How much lower than the then surface of the new Beach Avenue was the land for two or three hundred feet north? How far north from the area of the New Beach Avenue would you have to go to get land as high or higher than the area of the new Beach Avenue?

Mr. Sutherland: May it be made clear to the witness that counsel is asking him about the area of new Beach Avenue before new Beach Avenue was constructed as a street?

Mr. Oviatt: Certainly, I want that perfectly clear.

Q. Let me make this clear to you. I am asking about the area of New Beach Avenue as it existed when you first went down there to drive your stakes for the second extension; and I am asking you how far north you had to go from the area of the new Beach Avenue

till you got to this rise of land which rose up equal to or above the area of the new Beach Avenue?

A. About thirty feet.

Q. What did you mean when you said two or three hundred feet a moment ago?

A. What I meant was that in establishing my grade of 248.5 I struck natural sand about 250 feet north of the south line of Beach Avenue.

Q. And in that intervening 250 feet, what did you find?

[fol. 746] A. I found there was less than 248.5; out thirty feet north of the north line of Beach Avenue I got land Higher than Beach Avenue.

Q. For how long a distance?

A. For the whole balance of the 250 feet.

Q. Now then, how far north of the north line of the new Beach Avenue was the McIntyre ditch?

A. About 25 feet.

Q. And how much higher than the area of the new Beach Avenue, just before the second extension, how much higher than the New Beach Avenue was the top of the McIntyre ditch?

A. The south side was substantially the same as new Beach Avenue and the north side was six inches to a foot higher.

Q. Now how deep was that ditch from the top of the south bank?

A. Not very deep. I couldn't tell you now as to that. Maybe a foot and a half.

Q. And you excavated only a foot to put in a three foot drain?

A. That was a guess. We will say this ditch was two feet deep then. I haven't got the levels. I am giving the best of my knowledge.

Q. And your recollection of feet and distances is very indistinct?

A. The distances I have, from my plottings.

Q. The south bank of the McIntyre ditch was on a level with the old area of the new Beach Avenue?

A. Yes.

Q. And the ditch was how deep?

A. I will say one and a half to two feet deep.

Q. And you put a three-foot drain in there?

A. Yes.

[fol. 747] Q. And the top of the three foot drain was where with reference to the top of the south bank of the ditch?

A. It was higher than the top of the south bank.

Q. How much higher than the top of the south bank?

A. A few inches.

Q. How far?

A. I couldn't tell you how far.

Q. How — material did you put on top of the top of the three-foot drain?

A. Probably a foot.

Q. So that you must have excavated in that ditch about how much material in depth in order to put in the three-foot drain?

A. I would say we excavated anywhere from a foot to eighteen inches.

Q. Now the area in the new beach avenue just before the second extension was put in was at a level which you say went north to the south bank of the ditch which was about at the same elevation as the area of the new Beach Avenue?

A. Yes.

Q. Then the north bank of the ditch was about six inches higher than that?

A. Yes.

Q. Then as you went out, how far out did you go before you struck this ridge of land at the Spencer house?

A. Not so very far, from 100 to 150 feet.

Q. When you put your foot of material on top of the drain which was above the south bank of the ditch a few inches where with reference to the top of the material on the top of the drain did you lay your ties for the track?

A. Almost on top of them.

[fol. 748] Q. So that the bottom of your ties were a foot above the top of your tile, am I right?

A. I don't know about that. I should say the top of the ties were a foot above.

Q. So that the bottoms of your rails were about a foot above the top of the title in the ditch, am I right?

A. The bottom of the rail, yes.

Q. Am I right?

A. Yes.

Q. You clearly understand that, do you?

A. Yes.

Q. The top of your ties were 248.5, weren't they?

A. Yes.

Q. And then below that was this six inches of tie?

A. Yes.

Q. And then below that was a foot of fill?

A. Not necessarily a foot of fill.

Q. How much fill?

A. It would be six inches of fill.

Q. And then below that was put a foot of tile until you got down to a level with the top of the south bank of the ditch, am I right?

A. No, I think if you said six inches instead of a foot, you would be nearer.

Q. You would get six inches of ties below the bottom of the rail at 245.5. Then you would have six inches of Material filled, that would be six inches of fill, am I right?

A. Not from the top of the tile.

Q. How far was the tile sticking above the south bank of the ditch?

A. Not very much, just a few inches. I remember in going over this tile I built a cob house bridge and put my timbers on it.

Q. How high above the top of the tile was your timber to build the cob house bridge?

A. I should think about six inches.

[fol. 749] Q. And that was the bottom of the timber?

A. Yes.

Q. Then how thick was the timber?
A. 12 inches.
Q. Then where with reference to that twelve-inch timber was the tie?
A. They were spiked, or boxed on to the timber notched down two inches, that left them four inches above, and they set on top of the stringer.
Q. So that we have now the top of the tile six inches above the top of the south bank of the ditch?
A. Yes.
Q. And then we have six inches of fill, haven't we?
A. Yes.
Q. Then we have got a twelve-inch timber?
A. Yes.
Q. Now were the rails spiked on to this twelve-inch timber?
A. They were spiked on to the ties.
Q. Above the twelve-inch timbers were the ties?
A. Four inches of tie. They were boxed on to the stringers two inches. The ties were six inches thick, and they boxed in two inches.
Q. We have the bottom of the rail at 248.5?
A. Yes.
Q. Then we have six inches of tie?
A. Yes.
Q. And twelve inches of timber?
A. Four inches of tie and twelve inches of timber.
Q. Then this six inches of fill?
A. I wouldn't say positively about six inches of fill, because I put that bridge in there so we could run the tile under the bridge. I know I left room to put this tile in there, that is all I know.
Q. You answer develops that you have made certain positive statements, and then we follow them up——
A. I say now that there was six inches or less under the timber, on top of the tile.
[fol. 750] Q. How much less?
A. I don't know.
Q. Will you say there was about six inches?
A. Well, say six inches and let it go at that.
Q. Your best recollection now is that the botom of the rail was 248.5 and that below that would be four inches of tie, twelve inches of timber and six inches of fill, and six inches of tile before you got down to the top of the south bank of the McIntyre ditch, am I right?
A. No, because you said six inches of fill and six inches of tile and you don't mean that.
Q. How far above the top of the south bank of the ditch did the tile project?
A. I told you less than six inches.
Q. You can say about six inches?
A. I would say about six inches.
Q. Then my original question was correct, wasn't it?
A. Yes.

Q. Now do you clearly understand it?

A. Yes, I do.

Q. So that you had twenty-eight inches of distance between the bottom of the rail at 248.5 and the top of the south bank of the McIntyre ditch?

A. Twenty-two inches.

Q. Figure it up yourself and tell me if that is what you mean?

A. Yes, twenty-two inches.

Q. Have you figured the tile projecting above the top of the ditch?

A. You are right there, twenty-eight inches to the top of the bank.

Q. So that the top of the south bank of the McIntyre ditch was twenty-eight inches below 248.5?

A. Yes.

Q. So that the top of the south bank of the McIntyre ditch was 246.1 above sea level, wasn't it?

[fol. 751] A. It was higher than that.

The Master: How much higher?

A. It was at least 247.5, for the reason that I had no water there when I put that track in. It must have been at least 247.5.

The Master: So there is some discrepancy in your calculation of at least a foot?

A. Yes.

The Master: And you do not know where that discrepancy is?

A. No.

Q. You would cast out all the figures, would you not, in favor of your recollection that there wasn't any water in the ditch?

A. Yes sir.

Q. You consider that your personal recollection of there being no water there is better than me calculating these various items?

A. I do.

Q. Were these tile intended to take all the water from the creek?

A. Yes.

Q. In connection with your 1884 operations, wherever you excavated there for the railroad track or for any other purpose you found absolutely nothing except clean gray lake sand with no loam mixed, did you?

A. That is right.

Q. I want you carefully to consider that answer; that in all of your experience at the lake up to the time the fill was made and the balloon track was made, and in connection with all your excavations, you never found any loam in the sand north of Beach Avenue and east of Lake Avenue?

A. I never did.

Q. You are clear about that?

[fol. 752] A. Yes, except along that McIntyre Ditch.

Q. So that before 1884, there was no loam of any kind anywhere near the beach east of Lake Avenue, and any sandy loam that is there today must have been brought in there some way subsequent to 1884?

A. I wouldn't say. It might have been brought in prior to 1884, but I didn't see it.

Q. So far as your own recollection or knowledge is concerned, there was no loam there prior to 1884?

A. That is right.

Q. And all the material which you discovered or saw in connection with your excavation and other operations was sand which was distinctly lake sand; and then in 1884, during those operations, previous to which there was nothing but lake sand there, this whole area was covered over with this fill in these operations that you are speaking about?

A. The whole area around the track was this area between the rails.

Q. What ever was done was done at that time?

A. Yes, and subsequently, of course. I think some has been done since.

Q. Now did you discover, I take it, according to what you just said, right in the ditch, a little of this loam?

A. Yes.

Q. Whereabouts did you discover that in the ditch?

A. Anywhere along the ditch.

Q. Along the bottom and the banks?

A. Yes.

Q. Now, just to test your recollection, Mr. Gray, do you recall [fol. 753] that you stated on direct examination in this case, or did you not, that the tile was laid at a level of 243?

A. I think possibly.

Q. You did say that?

A. I think so.

Q. Now is it your best recollection at the present time that the bottom of the tile was 243?

A. Yes.

Q. And where was it 243, at the end of the drop toward the river of six inches, or at the Lake Avenue end?

A. I think near the river.

Q. That was 243?

A. Yes.

Q. So that at the Lake Avenue end, it would be 243.6?

A. 243.5, yes.

Q. What did you mean when on direct examination that the level of the ditch after the tile was laid was lower than the land on either side?

A. Just what I said.

Q. That is, the fill-in in the ditch or top of the ditch, was lower than the land on either side?

A. Yes.

Q. Do you mean that it was lower than the sides of the ditch?

A. What I mean was that the land on top of the ditch on either side was lower and sloped down from the elevation of the land, the level of the land sloped down.

Q. For how wide a distance from this ditch was the land lower than the surrounding land?

A. The total area from high point to high point was fifteen or twenty feet.

Q. So that the edge of the south bank was higher than the ditch after it was filled in?

A. No.

Q. The level of the north bank was higher than the level of the ditch after it was filled in?

A. Yes.

[fol. 754] Q. How was the level of the ditch when filled in, compared with the top of the south bank of the ditch?

A. It was higher.

Q. Then the ditch fill-in was higher than the south bank?

A. Yes.

Q. What was the difference in elevation between the top of the south bank and the top of the north bank?

A. About nine inches.

Q. Then the ditch was filled in so that it was lower than the top of the north bank and higher than the top of the south bank throughout?

A. Yes, quite likely.

Q. You say that you took material from the north where the ridge was, around the Spencer House, and carted it out south to fill in depressions to the south for the purpose of building the balloon track?

A. Yes.

Q. Now this material was taken from the excavation made for the balloon track, around the ridge around the Spencer House on the lower side, to fill in for the balloon track south of the Spencer House?

A. I don't think we had to fill in very much south for the foundation. We carried some, that is right.

Q. You carried some from the excavation to the north, to fill in the land at the south?

A. Yes.

Q. Now your excavation to the north was made down to a particular level, and then on top of that you put ballast?

A. Yes.

Q. How far from the bottom of your excavation from the ridge [fol. 755] for the purposes of the track did you fill in till you got to the bottom of the rail?

A. One foot.

Q. Of which about six or eight inches was tie, and the rest was what?

A. Sand or gravel.

Q. You at all times in constructing that track aimed to have a foot of ballast or other foreign material between the bottom of your rail at 248.5 and the exact bottom of your area?

A. No, we put in ties for sub-bases.

Q. What I mean is at all times there is at least a foot below the bottom of your rail?

A. Yes.

Q. So wherever you laid your track you had below the bottom of your rail at least a foot of ballast?

A. Yes.

Q. As distinguished from sand or any other material?

A. Yes.

Q. Now, some of the sand which you took out of the excavation of the track along the ridge you brought south to fill in places upon which to lay the balloon track? Is that right?

A. Yes.

Q. And you took this sand from the north laying it over the area as it then was and then put in a foot of ballast on top that would take care of your track?

A. Yes.

Q. In other words you had to have at least a foot of ballast before you got down to the sand and which you either excavated or put in?

A. Yes.

Q. Now how much sand did you excavate from the north in this ridge, how large a quantity?

A. It was up as high as three feet.

Q. And you dumped that in this area south?

A. Yes.

[fol. 756] Q. How much in depth was the sand which you dumped in there on the lower area south, for the purpose of building the balloon track?

A. Not a terrible lot.

Q. About how deep was it?

A. Well, six inches, perhaps.

Q. And perhaps a little more in some places?

A. Maybe, in some places.

Q. I think you said the other day that there were some places where it was over a foot, were there not?

A. There might have been because there were depressions.

Q. In those places where there was a foot of sand dumped in the area where it was dumped was only about 246.5 above sea level, was it?

A. About that.

Q. So that in some of these pits where we find lake sand with loam on top, we may be finding lake sand which has been dumped in there by you?

A. It might be.

Q. So that the original elevation of the area disclosed by the pit may be lower than the lake sand appearing in the pit because of your having filled that lake sand into the area?

A. Yes, but I don't find any diagram here where a pit appeared where we had a track.

Q. Now did you use all of the lake sand in this three foot excavation only along the line of track?

A. No, we dumped some in the south end there, wherever there was a depression that needed filling.

Q. So that you had filled in lake sand at other places than along the balloon track.

A. Yes.

[fols. 757-762] Q. So that whether a pit was in the track or was not in the track it might disclose lake sand filled in by you?

A. Yes.

Mr. Oviatt: I am not finished with my cross-examination, but I am willing to incur the hazard which was suggested. I want the privilege of some further cross-examination after I have read over his former testimony.

The Master: That is so, so far as the effect of your suspension at this time, it is understood that the cross-examination is closed but you are asking the privilege of calling Mr. Gray as defendant's witness for cross examination. Now if anything occurs to you—

Mr. Oviatt: Let me put it in another way. We waive the right to move to strike out.

[fol. 763] COLLOQUY BETWEEN MASTER AND COUNSEL

Mr. Abbott: If Your Honor is agreeable, Mr. Beach and Mr. Moser and Judge Sutherland and I are going to get together and make a few minor corrections in the record, where the stenographer has not quite correctly caught what was said, and we thought that it would save Your Honor's time if we did it together, rather than to take the time of the Court while we are here.

Mr. Oviatt: Of course, we will have the copy of the Minutes Your Honor has corrected to correspond.

Mr. Beach: At the opening of the hearings, when I stated that the answers of the defendants the New York Central and the Central Union Trust Company of New York had been amended by order of the Supreme Court, at that time I did not have printed copies of the amended answers. I have them now, and they have been filed with the Clerk of the Supreme Court in Washington; and I have here an amended answer which I will give Your Honor to supplement the one which Your Honor has.

Mr. Moser: I make the same announcement with reference to the amended answer of the Bartholomay Company, and I will substitute this one for the one Your Honor has.

Mr. Sutherland: Your Honor I think has the supplemental and amended answer of the Ontario Beach Hotel and Amusement Company, and also the answer of the Upton Company. I think I handed copies to you at our first hearing.

[fol. 764] Mr. Beach: Another correction; The defendants' Exhibit 1, which was put in early in the session, was a deed and map from the records of the Genesee County Clerk's Office. It appears that the deed itself was not marked as an exhibit, but that the map only was so marked, as appears on the minutes. Since that time I have ascertained that the Clerk, in certifying that deed, made a slight error as to the page; also that the map attached did not quite include all of what appears upon the original map in

Genesee County. I have taken this up with Mr. Abbot, and he agrees that the correct transcript of the deed and the map as a whole shall be substituted as Exhibit 1, instead of the exhibit 1 which appears upon the minutes, it being in substance the same thing. If that is agreeable, the Clerk will mark this as Exhibit 1.

Accordingly the paper referred to and presented by counsel was marked Exhibit 1 for defendants.

Mr. Getman: Before the taking of testimony is resumed I wish to rather explain why the State has not taken a more active part in this proceeding.

As I announced at the outset, and as it appears to the State of New York at the present time, the primary concern of The People is the issue between the Commonwealth of Massachusetts and the People of the State, which I believe the State of New York regards as being [fol. 765] one of law only; that is the interpretation or construction of the treaty between the two parties. It does not appear to the State of New York that there is any issue of fact with which the State of New York is primarily concerned. If there is any issue of fact, it is between the People of the State of New York and the other defendants to this action, which would undoubtedly be a matter for the State Courts to consider; and it is for that reason that the People of the State of New York have not actively participated in the trial; and it is questionable as to whether the People of the State of New York will offer any testimony, depending entirely on that introduced by the plaintiff and the other defendants.

The Master: Mr. Attorney General, do I understand that in this proceeding there is no issue between the People of the State of New York and those claiming as private owners of this land?

Mr. Getman: That is right, Your Honor, there is no issue.

Mr. Sutherland: I am very glad, sir, to have that inquiry made by the Court. I understand Mr. Getman to indicate to the Court the opinion of the Attorney General of this State that in this action, which is in the Supreme Court of the United States, any controversy that may in fact exist between the State of New York and the private claimants in regard to the ownership of this land, would be a question to be tried out in the tribunals of the State of New York, if there is any such question; that when the Supreme [fol. 766] Court of the United States decides, if it does so decide, that Massachusetts has no claim upon this land, that will end this present lawsuit.

The Master: And that the State of New York desires to offer no testimony, and to make no contention in this proceeding as between the People of the State of New York and the private claimants?

Mr. Sutherland: Yes.

Mr. Beach: We confirm that, representing the New York Central and the Central Union Trust Company.

The Master: Do you now want to proceed with Mr. Gray?

Mr. Oviatt: Our cross examination has been concluded.

Mr. Sutherland: There are one or two corrections we want to make in Mr. Gray's testimony.

WILLIAM C. GRAY, recalled, examined by Mr. Sutherland:

Q. Mr. Gray, since the last hearing at which you were examined as a witness, have you made any investigation as to the tile or pipe laid under the line of the so-called McIntyre ditch?

A. I have.

Q. Will you tell the Court what you ascertained upon that investigation?

Mr. Oviatt: I ask for a preliminary examination.

Mr. Oviatt:

—. Did you make your investigation from any written documents?

A. No sir.

Q. To what source did you go for that investigation?

[fol. 767] A. I went down to the beach and dug a pit, located the pipe, and took the elevation on top of the pipe, on the 21st of November.

Examination resumed by Mr. Sutherland:

Q. Proceed Mr. Gray.

A. I found as I stated in my direct examination, following Mr. Weston, who said that the pipe was three feet in diameter,—I supposed he knew what the diameter was, that is was three feet; investigating on the 21st of November, I found that the pipe was two feet in diameter.

Q. How did you ascertain that fact?

A. By opening it up, uncovering the pipe.

Q. Is that inside measurement or outside measurement?

A. Inside measurement. The thickness of the pipe is one tenth of a foot, and the top elevation, the top of the pipe, the south pipe, was 247.58 and the north pipe 247.60.

Q. At what point in the length of the pipe did you take the elevation which you have just given?

A. In the extension of pit No. 12.

Q. From pit No. 12, as indicated upon the chart already in evidence, you made an extension until you came to these two lines of pipe?

A. Yes sir.

Q. How close to the pipe was pit No. 12?

A. The center of the south pipe was 8 and one half feet north of the center of pit No. 12.

Q. Did you give any testimony as to the grade at which the pipe was laid?

[fol. 768] A. The pipe was laid with a fall from Lake Avenue of six inches.

Q. From Lake Avenue to the river, six inches?

A. Yes.

Q. What would this point be as between Lake Avenue and the River?

A. Nearly midway.

Q. About midway?

A. Yes sir.

Q. Have you ascertained since the last hearing the exact date of the burning of the Spencer House?

A. Yes sir.

Q. How did you fix that date?

A. Through the publication of the Democrat and Chronicle of January 20, 1882.

Q. Telling of the fire the day before?

A. Yes. It said it caught between eight and nine P. M. the day before.

Q. That would be January 21?

A. January 19, 1882.

Q. The Democrat & Chronicle is a daily newspaper published here in Rochester?

A. Yes sir.

Q. Mr. Gray will you examine that photograph and tell me whether you recognize it?

A. Yes sir, that is the west side of the Spencer House.

Q. That would be the side of the Spencer House facing or fronting toward Lake Avenue?

A. Yes.

Picture last above referred to, offered and received in evidence, and marked Defendant's Exhibit 19.

The Master: Is that the only picture of the Spencer House that has gone into the record?

Mr. Sutherland: That is not sir, we have had another picture of the Spencer House.

[fol. 769] Q. Will you look at another photograph and tell the Court whether you recognize what that is a picture of?

A. That is also the Spencer House, taken from the dock or pier.

Q. Looking in which direction by the point of the compass, the eye of the camera would be looking in what direction?

A. It would be looking southwest.

Mr. Sutherland: I offer that pisture in evidence.

Picture last above referred to received in evidence and marked Defendants' Exhibit 20.

Q. I show you another photoghaph and ask you if you recognize the locality and objects therein depicted?

A. I do. That is a panoramic picture taken from the top of the Spencer House looking west, showing the buildings on the Bartholomay property and buildings beyond.

Q. In that picture do you discern the railroad track?

A. I do.

Q. Are you able from your recollection, looking at the picture, to state what railroad track that is that appears in that picture?

A. That is the New York Central Railroad track, the straight track.

Q. Before the balloon track was put in there?

A. Yes sir.

Mr. Sutherland: I offer that picture in evidence.

Picture last above referred to received in evidence and marked Defendants' Exhibit No. 21.

Q. Are you able in Exhibit 21, which I have just been showing you, to state where old Beach Avenue then was?

[fol. 770] A. Yes sir.

Q. Point it out and describe it to the Court?

A. Right on the left open space in the picture.

Q. Are you able to see on this photograph, any part of Lake Avenue?

A. Yes sir.

Q. Where is that?

A. Right immediately East of the Bartholomay cottage buildings.

Q. What is the long building with porches on it, which you see in the middle of the picture?

A. That is a Bartholomay building, the Cottage Hotel.

Q. Do you know what the little wooden building in the foreground of the picture was, just across the railroad track from the front of the picture?

A. It was a little cottage or a little shack belonging to somebody, I don't know who. They had porches on it and that is all I can remember about it.

Q. Now Mr. Gray, in that picture are you able to recognize and state the character of the soil which is shown there?

Mr. Oviatt: I object to that as repetitious. The witness has in a number of instances, both on direct and cross examination, testified to the character of the soil south and north of and along Beach Avenue.

The Master: He may answer it.

A. It is irregular sandy soil.

Q. Will you look at the soil or line of the railroad track and state whether you discern there any other soil or land in the nature of a fill or ballast, than sand?

A. I do not.

[fol. 771] Q. I show the witness another photograph. Are you able to recognize and identify the objects in that picture?

A. I am.

Q. What is that a picture of?

A. That is a panoramic view of the beach, looking from what would now be about the West line of Terry Clark, looking east toward the River and showing some of the Bartholomay cottages and the Spencer House in the background.

Q. Are you able to say from a comparison of the photographs whether this was taken at about the same time that the other pictures were taken?

A. I should say it was.

Q. Look at the pier as it extends out from the vicinity of the Spencer House. I call your attention to a blur in the picture?

A. Yes sir.

Q. There was no break in the pier at the point where that blur is shown on the picture was there, at that time?

A. No sir.

Mr. Sutherland: I offer that picture in evidence.

Picture last above referred to received in evidence and marked Defendants' exhibit No. 22.

Q. Mr. Gray, I show you a fourth photograph and ask you if you are able to identify and recognize the objects therein depicted?

A. I do.

Q. What is that a picture of?

A. That is a picture showing a front view of a part of the Hotel [fol. 772] Ontario and building east of it, which I think they afterwards called Hilarity Hall, a train on the Balloon track, with the crowds of people around it, and the board walk running along the beach which has since been changed to a cement walk.

Q. How far to the west did that board walk go?

A. It originally ran from Lake Avenue to the pier.

Q. Well didn't it go west of Lake Avenue originally?

A. Yes across Lake Avenue and went over there the full width of the Bartholomay property.

Q. Did the platform itself occupy any of the area of Lake Avenue?

A. No sir.

Q. The board walk shown there and the picture shown there is all east of Lake Avenue?

A. Yes.

Q. Now between the walk and the track as shown on that photograph, are you able to state the nature of the soil, whether it is sand or other soil?

A. Sand.

Q. Is there any other soil shown in that picture?

A. No sir.

Q. What do you say of the soil between the plank walk, the board walk, and the Lake?

A. Sand.

Q. Any other kind of soil there except sand?

A. No sir.

Q. Do you know when that picture was taken?

A. I do not.

Q. The picture however, is a correct representation of the situation there at some time when the Balloon track had been laid and cars were running on it?

A. Yes sir, it was after 1884.

Mr. Sutherland: I offer it in evidence Your Honor.

[fol. 773] Picture last above refferred to received in evidence and marked Defendants' Exhibit No. 23.

Q. Will you look at another photograph and tell me whether you recognize what that is a picture of?
A. Yes sir.
Q. What is it a picture of?
A. That is a picture substantially the same as the other, but taken out so as to bring a portion of the lake and beach into the picture, and without the train of cars.
Q. You see the Balloon track there however, do you not?
A. Yes.

Mr. Sutherland: I offer that picture in evidence.

Picture last above referred to received in evidence and marked Defendants' exhibit 24.

Q. I show you another picture Mr Gray and ask you if you recognize what that is a picture of?
A. Yes sir.
Q. What is it?
A. That is a picture showing the Harris, or before, the Stutson Pavilion, which was east of Hilarity Hall and between Hilarity Hall and the River. It shows also a portion of the Balloon track.
Q. What about the trees that are shown in that picture.
A. Those are Willow trees and I assume they are the same trees as depicted on one of the exhibits, I think exhibit 8.
Q. Those trees are still standing are they not?
A. Yes.
Q. And you, on one of the maps prepared, show the location of those trees do you not?
A. Yes.
[fol. 774] Q. Those are two of the same trees that you had located in your map that is already in evidence?
A. I believe they are, yes.
Q. Those pictures are correct representations of the conditions at the time they were taken?
A. Yes sir.
Q. You do not know the date when these photographs that I have shown you, were taken?
A. No sir, it was subsequent to 1884.

Mr. Sutherland: I offer the photograph in evidence.

Picture last above referred to received in evidence and marked Defendants' exhibit 25.

Mr. Sutherland: I think that is all.

Examined by Mr. Oviatt:

Q. All these photographs to which you have testified or with reference to which you have testified, are prints, which have been made very recently are they not?

A. I don't know that.

Q. You are sufficiently familiar with photography in the course of your profession to know that prints of the character of exhibit 25, are much more recent than the burning of the Spencer House?

A. Yes it is more recent of course, because none of those buildings were there at the burning of the Spencer House.

Q. Do you know where the originals of those prints are?

A. No sir.

[fol. 775] Q. You are simply testifying to pictures which have been presented to you by counsel?

A. Yes sir.

Q. You do not know anything about the originals?

A. No sir.

Q. I want to call your attention to the testimony of the last hearing. I think you testified that the straight track was laid in such a manner that it was level with or below the grade of the surrounding soil?

A. I did.

Q. I call your attention to Exhibit 21, and I ask you if from the appearance of that photograph, it is not indicated that the level of the bottom of the rail and some of the tie is above the level of the surrounding shore?

A. It does seem to be that way.

Mr. Sutherland: These photographs that we have put in evidence just now are enlargements that we have recently had made from smaller pictures. If Your Honor would like the smaller pictures in evidence why we will produce them.

The Master: I do not think there is any point made of that.

Mr. Oviatt:

Q. Mr. Gray——

The Master: Pardon me, Mr. Oviatt, are you going to some other matter not concerning these pictures?

Mr. Oviatt: Yes.

The Master: I would like to ask a question or two and I would prefer to ask it at a time when they are immediately before me.

[fol. 776] By the Master:

Q. Mr. Gray, you have testified as to four photographs, marked defendant's exhibits number 19, 20, 21 and 22?

A. Yes, sir.

Q. Which are the larger ones?

A. Yes, sir.

Q. And three smaller photographs, defendant's exhibits number 23, 24, and 25?

A. Yes, sir.

Q. Now, as I understand you, these first four here, from 19 to 22, inclusive, are representations or enlargements of smaller photographs that must have been taken before January 19th, 1882?

A. Yes, sir. I will be sure about that. Yes, they were.

Q. And the three smaller ones are enlargements of photographs that must have been taken after 1884?

A. Yes, sir.

Mr. Sutherland: We can fix the dates probably when the Balloon Tract was taken out, your Honor.

The Master. Well, we know the Balloon Tract was constructed some time about 1884.

Mr. Sutherland: Yes.

The Master: We know that the Spencer House was destroyed on January 19th, 1882.

Mr. Sutherland: Yes. I was going to remark that we have not fixed the date in the record when the Balloon Tract was taken out of that locality. We can do that, approximately, so that then you [fol. 777] will have the dates within which the smaller photographs must have been taken.

The Master: I will be glad to have that.

Mr. Sutherland: Yes, we will try and fix that date.

The Master: If you can do so.

Mr. Sutherland: Yes.

Q. Mr. Gray, you lived here at that time, that is to say, before January 19th, 1882?

A. Yes, sir.

Q. And you were familiar with all these surroundings?

A. Yes, sir.

Q. You have been at the Spencer House, have you?

A. Oh, many at time.

Q. How many rooms did it have?

A. I don't know about that.

Q. How many people could it accommodate?

A. That, I could not tell you.

Q. Well, would you say it had about fifty rooms or five hundred, or less than fifty?

A. Well, I should say it might have fifty rooms.

Q. How many floors did it have?

A. Three floors.

Q. Three floors, and an attic, did it have an attic?

A. Had an attic, yes, sir.

Q. What was the character of the foundation?

A. It was largely built on squared timber posts.

Q. Sort of piling?

A. Well, you might call it piling, although they were not driven; they were put down and set on a base of timbers and came up above

the ground, and then the sills of the Spencer House were put on [fol. 778] that.

Q. Were any of the posts set upright?

A. They were all set upright, these posts.

Q. Upright?

A. Yes, sir.

Q. That is to say, vertically?

A. Vertically, yes, sir.

Q. And those posts rested upon a foundation set horizontally below?

A. Yes, sir.

Q. Also of timber?

A. Yes, sir.

Q. Was there any stone construction in the foundation?

A. As I recall it, along about the center of the house was a parlor, and there was a big chimney in there and a grate. That was on a foundation, a stone foundation, as I recall it.

Q. What was the distance from the front porch of the Spencer House, facing the Lake, to the water, in the days when you remember it along about the time that these pictures were apparently taken?

A. I couldn't tell you now without reference to the map.

Q. Well, approximately?

A. Oh, I should say 200 feet.

Q. What was the distance from the back of the Spencer House down to the ditch or pool that has been testified to in this case?

A. Well, another 200—oh, to the north end of the pool?

Mr. Moser: That can be identified exactly from his survey.

Mr. Beach: It shows on this map, exhibit 8.

Mr. Moser: Is the Spencer House there?

Mr. Beach: Oh, yes.

[fol. 779] A. To the north edge of the pool, about 30 feet.

Q. About 30 feet?

A. Yes, sir. And the front of the Spencer House, I want to amend that—make it 250.

Q. Where were the stables, barns, that had been testified to on some occasions with respect to the Spencer House?

A. Southwest.

Q. North?

A. Southwest.

Q. South and west?

A. Yes, sir.

Q. And how far were those barns from the north line of the ditch that ran out into the river, or towards the river?

A. The nearest point, about 56 feet, 57 feet, something like that.

Q. And where with respect to the Spencer House were these Willow trees that you have testified to?

A. About 110 feet northwest.

Q. The Spencer House was 110 feet northwest of the Willow trees?

A. No. The Willow trees were 110 feet northwest of the Spencer House.

Q. Out towards tre Lake?

A. Towards the Lake.

Q. And to the west?

A. Yes, sir.

Q. And how far was it from the north line of the ditch, to what has been called the swamp in this case?

A. Well, the nearest point of the swamp would be the extreme west, southwest edge of it, and it would be substantially 345 feet.

Q. All right. Showing these photographs of the Spencer House, what was the character of those trees there in front?

[fol. 780] Mr. Moser: Which exhibit is that?

The Master: Exhibit number what?

Witness: Exhibit 20.

Q. Number 20?

A. Those trees were all willow trees.

Q. Those are willow trees?

A. Yes, sir.

Q. And I show you exhibit 19, what were those trees?

A. Willow trees.

Q. Willow trees?

A. Yes, sir.

Q. Were there any trees anywhere that you recall on any of this property in dispute that were not willow trees?

A. No, sir, there were not.

Q. Showing you again defendants' exhibit number 19, I call your attention to some vegetation in front, in the foreground of the picture.

A. Yes, sir.

Q. What is that vegetation?

A. That vegetation was heavy grass, weedy stuff.

Q. Natural grass?

A. Natural grass.

Q. Growing out of what?

A. Growing out of the sand.

Q. Out of the sand?

A. Yes, sir.

Q. And nothing but sand?

A. Nothing but sand.

Q. Now, looking at exhibit number 21, what is the nature of this shrubbery, small undergrowth there, in that picture?

A. Well, you mean this stuff down in here (indicating on the exhibit)?

Q. Yes.

A. Why, that was all grass, wild grass, bunch grass, you might call it.

[fol. 781] Q. Bunch grass? Is that what it is called?

A. Bunch grass, I have heard people speak of it as that.

Q. Was there ever any sodding or sowing of grass, either sodding or sowing around there in the neighborhood of the Spencer House?

A. Not that I am aware of.

Q. Was there any attempt to make a greensward or lawn there?

A. No, sir.

Q. How far from the front porch of the Spencer House did old Beach Avenue run?

A. Run right up to it.

Q. And did it stop there?

A. Yes, sir, it stopped there.

Q. Well, was it stopped by the Spencer House, or did it run in front of the Spencer House?

A. It stopped at the—well, it ran around the north end of the Spencer House so as to get over to the ferry.

Q. Well, now, as you recall the situation at or about the time these photographs were taken and before there was any Balloon Tract, but after the straight track was constructed——

A. Yes, sir.

Q. Suppose one wanted to go from the village of Charlotte over to the Spencer House, how would you proceed?

A. Proceed down Lake Avenue, now Lake Avenue—we used to call it Broadway in those days—down to this road running from Lake Avenue over to the Spencer House.

Q. Well, what obstructions or depressions would he have to pass?

A. None whatever.

[fol. 782] Q. From Lake Avenue, down Lake Avenue and out old Beach Avenue to the Spencer House?

A. Yes, sir.

Q. He could go without encountering a bump of any sort?

A. Yes, sir.

Q. Would he cross any bridge anywhere?

A. Why, there were three or four boards wide of a bridge over a soft place at Lake Avenue; I wouldn't exactly call it a bridge but it was softer than the rest of the soil and those boards were put there to prevent the wheel from cutting down into it.

Q. You mean for one driving?

A. Yes, sir. If you walked, of course, it would not be necessary to have anything.

Q. Would he have to cross what has been termed the creek at any point on that trip?

A. In Lake Avenue, yes, sir.

Q. Well, where would he cross that creek?

A. On the sidewalk line and in the street line, the driving line.

Q. And how far from what was generally the Lake front or the water line would *he* cross that creek, going generally north, in a generally northerly direction, about how far from the water line would he cross that creek?

A. About 330 feet.

Q. 330 feet?

A. Yes, sir.

Q. And how far would that be from the present Beach Avenue? It would be north of it, wouldn't it?

A. Yes, it would be north of it.

Q. How far north of it?

A. Well, from center to center, about 260 feet.

Q. What I was asking was this point that the pedestrian going north on Lake Avenue—is that what you call it?

A. Yes, sir.

[fol. 783] Q. Going down towards the old Beach Avenue, you say he would cross a bridge or creek?

A. Yes, sir, the outlet of that creek coming form the south.

Q. Yes. And I asked you how far the point at which he would cross that creek was in those days from what is now Beach Avenue?

A. Well, substantially the same. Of course, it is an indefinite thing because it has been changed so in later years it is hard to tell within 50 feet of where it might have been, but it is substantially about the south line of the present Beach Avenue.

Q. In other words, the present Beach Avenue, if you can imagine the creek there now——

A. Yes, sir.

Q. The present Beach Avenue would cross that creek, wouldn't it?

A. Yes. Well, no, no. The present Beach Avenue wouldn't. Lake Avenue would cross it but the creek would be about where the present Beach Avenue, south line of the present Beach Avenue is.

Q. I know, but the creeks runs from the south, it runs generally south and east, doesn't it?

A. Yes, sir.

Q. Now, whereas present Beach Avenue is a straight line, so that straight line would be bound at some point to cross where the old creek was, wouldn't it?

A. The old creek was south, my recollection is and my knowledge is that the old creek was south of or about the south line of the present Beach Avenue. Subsequently they dug what is called the McIntyre ditch and diverted all the water through that MyIntyre ditch which was north of the present Beach Avenue.

[fol. 784] Q. Yes. But the present Beach Avenue, or the line where the present Beach Avenue runs, is projected——

A. Yes.

Q. Would be bound to cross at some point either the old stream or the McIntyre ditch, wouldn't it?

A. Yes, sir; bound to.

The Master: I think that's all.

By Mr. Sutherland:

Q. Mr. Gray, if the creek, at the time the question is directed to, followed the line of the McIntyre ditch and the line of the tiling that you say was laid along the course of the McIntyre ditch, would that line cross new Beach Avenue projected to the west?

A. It was entirely north of new Beach Avenue.
Q. What?
A. It was north of new Beach Avenue.
Q. The tiling which follows the line of the old McIntyre ditch is north of new Beach Avenue?
A. Yes, sir.
Q. Now, at what point does that tiling turn to the south?
A. Why, it crossed Lake Avenue and then turned south.
Q. Well, how far from the westerly edge of Lake Avenue does the tiling turn and go south?
A. I can't tell you definitely. Between 50 and 90 feet.

The Master: Are you going up stream or down?
Mr. Sutherland: Going up stream, sir.
Witness: Going up stream.

Q. Now, after it turns to the south it crosses a line of new Beach Avenue projected westwardly?
A. Yes, sir.
Q. But does not cross that line at any point east of Lake Avenue?
A. No, sir.
[fol. 785] Q. Now, where, Mr. Gray, with reference to the line of McIntyre's ditch where it ran under Lake Avenue, was the soft spot that you say was reinforced with some three or four planks?
A. Why, it was just east of—just the east side of Lake Avenue.
Q. Now, let me see if we can travel right in the same groove here. You have a point where the McIntyre ditch, successor to the old stream——
A. Yes.
Q. And cross Lake Avenue?
A. Yes, sir.
Q. And that's substantially the point where new Beach Avenue, coming from the river, reaches Lake Avenue?
A. Yes, sir.
Q. Now, there was a bridge over that ditch, was there, in Lake Avenue?
A. Yes, sir.
Q. That is not what you are talking about when you are speaking about three or four planks?
A. It is not.
Q. Now, you talked about a place on Lake Avenue where there was a soft spot that was reinforced for carriage travel by three or four planks?
A. That was, I said, in old Beach Avenue.
Q. Was that in Lake Avenue or was it in old Beach Avenue, where those planks were laid?
A. Well, it is hard to define that now because there were no fences or anything up there to designate the lines of either one of them, but it was substantially where Beach Avenue and Lake Avenue came together.

Mr. Oviatt: You mean old Beach Avenue.
Witness: Old Beach Avenue.

Q. Old Beach Avenue?
A. Yes.
Q. Now, as you turned from Lake Avenue, or old Broadway, to go [fol. 786] to the right to the Spencer House, at about that turning point there was a soft place, was there, in the sand?
A. Yes, sir. In other words, it would be planks or bridging across the gutters.
Q. Now, wait a minute. Was this soft place that you talked about just where you turn from Lake Avenue to follow old Beach Avenue out to the Spencer House?
A. I think it was.
Q. At the turning point?
A. I think it was.
Q. Now, was there any water there, visible water there at that point?
A. Why, I have never seen any water there.
Q. Were those planks laid so that they ran north and south or east and west, or were they on an angle?
A. North and south.
Q. Will you be able to give any approximation as to how close those planks were laid to the actual east line of Lake Avenue?
A. Why, no. As I say, there were no fences or anything to designate it.
Q. Yes.
A. I wasn't making surveys in those days.
Q. All right.
A. I couldn't say.
Q. Now, was that anything other than sand, or was there any surface soil laid at that point?
A. All sand, as I remember it.
Q. Was there anything like a channel or water course at that point where you say these planks were laid?
A. No.
[fol. 787] Q. What were the planks laid on?
A. I suppose they were laid on stringers, I don't know.
Q. Do you know?
A. I do not.
Q. Was there anything in the nature of a culvert there?
A. No.
Q. Whatever it was it was laid on the surface of the sand.

Mr. Oviatt: Oh, no. He said it was laid on stringers; he said he thought it was laid on stringers.

A. No, on stringers.
Q. Well, the stringers were laid on the sand?
A. The stringers were laid on the said.
Q. Very good. Nothing in the way of a foundation?
A. No built foundation.
Q. Over which this bridge passed?
A. Yes.

Q. Do you know anything about what the village of Charlotte did with regard to the care of old Beach Avenue; have you any knowledge on that point?

A. No, sir.

That's all, your Honor, for the present.

By Mr. Oviatt:

Q. Mr. Gray, you spoke about these plankings as crossing a gully, in one of your statements here this morning?

A. Gully?

Q. Yes.

A. No.

Q. Didn't you?

A. No.

Q. You didn't use that word?

A. No. If I did it was a mistake.

Q. The planking you say was laid north and south?

A. Yes, sir.

Q. So that the stringers on which they were laid ran east and [fol. 788] west?

A. Yes.

Q. Do you remember the size of the stringers?

A. No, I do not.

Q. Did the Spencer House owners or anyone else do anything with reference to fixing up the approach from Lake Avenue along old Beach Avenue by grading or filling or anything of that kind?

A. Not that I know of.

Q. Do you recall their having built a sidewalk in there?

A. Yes, I remember a sidewalk in there.

Q. And do you remember that that sidewalk was constructed of something besides allowing the people to make it by walking on the sand?

A. It was a plank sidewalk.

Q. A plank sidewalk?

A. Yes, sir.

Q. Your recollection of that is clear?

A. Yes, sir.

Q. On which side of old Beach Avenue was the plank sidewalk?

A. South side, I believe.

Q. The south side?

A. Yes, sir.

Q. Now, that plank sidewalk didn't run all the way to Lake Avenue, did it?

A. I don't know.

Q. Don't you recollect just where this gully or depression that you spoke about was?

A. I don't remember that.

Q. So that you have not any recollection as to whether or not in leaving Lake Avenue to turn to the east to follow this plank sidewalk

you had to cross some place where there was no sidewalk at all, as a pedestrian?

A. I don't remember that at all.

[fol. 789] Mr. Oviatt: That's all.

Mr. Beach: We have a witness here now——

The Master: You had some questions you would like to bring out?

Mr. Beach: Yes, but I have a railroad man whom we want to let go, and I can get through with him in about five minutes and we can go on with Mr. Gray afterwards with a lot of other stuff that we have, if I might do that.

The Master: Any objection to that, Mr. Oviatt.

Mr. Oviatt: Pardon me.

The Master: They propose to withdraw this witness for a moment to call another witness who wants to get away.

Mr. Beach: A railroad man who wants to get away.

James W. H. Muschett was thereupon called as a witness on behalf of the defendants and, being duly sworn, testified as follows.

Direct examination:

By Mr. Beach:

Q. Mr. Muschett, where do you live, and what is your occupation?

A. I live at 86 Manhattan Avenue, Buffalo, New York; occupation, civil engineer.

Q. And as civil engineer, by whom are you employed?

A. New York Central Railroad.

Q. Where?

A. Rochester.

Q. And what title, have you, if any?

A. Resident engineer.

Q. Of the New York Central?

A. Yes, sir.

Q. And as such resident engineer have you in your office records [fol. 790] of work done at various times on the different branches of the New York Central?

A. Yes, sir, I have.

Q. Have you records of work done on the R. W. & O. divisions, at Charlotte?

A. I have.

Q. The bridge across the Genesee River?

A. I have.

Q. And have you examined those records?

A. Yes.

Q. Have you the records showing the time at which the planking, piling, and sheathing, were put on the R. W. & O. bridge across the Genesee River?

A. I have.

The Master: What do you mean by the R. W. & O.?

Mr. Beach: R. W. & O. is the Rome, Watertown and Ogdensburg. It has been referred to here in the testimony as being a railroad about a half mile south of the premises in question.

Q. That is a swing bridge?

A. It is.

Q. And it rests upon a pier in the center of the Genesee River at that point?

A. It does, yes, sir.

Q. And describe that pier there in the center as to how it is constructed?

A. It is constructed on piling, with timber crib work above it and filled in around the sides with rip-rock.

Q. And are there plank sheathing on the sides of the pier?

A. On the sides of the pier, yes.

Q. Extending up and down?

A. They do.

Q. And at the southerly end, what is there there?

A. There is a stark water, known as a stark water?

Q. What is that?

A. A pointed pier.

[fol. 791] Q. And how is that covered?

A. That's covered with a metal sheathing.

Q. And south of that is what?

A. Well, I'm not familiar enough to say just what exists south of that.

Q. Well, there are some piling there?

A. There was.

Q. That you have a record of having placed?

A. I have the records here that show the piling placed.

Q. Well, you have examined those records?

A. I have.

Q. Will you tell us, please, on what date that wooden sheathing or planking was put on that pier?

Mr. Oviatt: That is objected to as calling for the contents of a written document not in evidence.

Mr. Beach: Well, we can put it in evidence if you want it. Do you want to insist on that?

Mr. Oviatt: I don't know what you are getting at here. I don't know how far this is going.

Mr. Beach: I will tell you frankly. The point is we want to show the date on which this sheathing or wooden planking was put on this center pier, the point being that General Abbot testified to certain marks upon that sheathing or planking, when he was a witness in this case. I wanted to show from the records that that sheathing or planking was put there, as the evidence would show, in the latter part of 1918.

Mr. Oviatt: Well, were you here in 1918?

Witness: I was in Buffalo in 1918, but these records were kept by [fol. 792] the resident engineer whom I succeeded here. I have

gone through those records and looked up certain dates that have been asked for.

The Master: Well, who has charge of these records?

Witness: I have charge of them now. At that time, at the time the work was done, there was another resident engineer.

The Master: But these records as to which you propose to testify, or to refresh your memory from, are records in your charge?

Witness: Yes, sir directly in my charge, and I report to a district engineer who is located in Buffalo, but I have charge of this office.

The Master: But you didn't make the records?

Witness: No.

The Master: Do you want these records to go in, or will you permit the witness to testify from them by refreshing his memory from the records which are in his possession?

Mr. Oviatt: The witness can't refresh his memory; he has no memory.

The Master: Yes, I think he has; I think he said he had.

Mr. Oviatt: No, he has no memory. He was in Buffalo at the time.

[fol. 793] Witness: I personally didn't have charge of this work at the time it was put in.

Mr. Oviatt: You didn't see it being done?

Witness: No.

Mr. Oviatt: You don't know when it was done except as the records show?

Witness: Except as the records show.

Mr. Oviatt: I think the witness is incompetent; he has no recollection, he didn't see the work done, and while I don't want to be technical in the case, there is a phase in this case dependent upon the records of the New York Central, that has not yet been developed and I think I must object to this witness using records of this kind, which records are not proven for the purpose of ostensibly refreshing a recollection with never existed.

Mr. Beach: I can put the records in evidence, if you insist on that.

(Whereupon discussion occurred which the stenographer was directed not to take.)

Mr. Sutherland: I submit the records be marked for identification as the records of the New York Central.

(Whereupon the witness was excused for the purpose of finding the record and producing it to have it marked for identification.)

MILTON J. MCINTYRE was thereupon called as a witness in behalf of the defendants and, being duly sworn, testified as follows:

[fol. 794] Direct examination.

By Mr. Moser:

Q. Mr. McIntyre, you are one of the defendants in this action?
A. I am.
Q. You are no relative of Martin McIntyre who used to own the Spencer House?
A. No, sir.
Q. Or who used to own the building where afterward the Spencer House stood?
A. No relative at all.
Q. You are claiming to be the owner of one of the parcels of land facing on Beach Avenue?
A. Yes, sir.
Q. In lot 20?
A. Yes, sir.
Q. When did you buy that property?
A. 1888.
Q. 1888?
A. Yes, sir.
Q. And what was the frontage of the property on Beach Avenue that you bought?
A. 75 feet.
Q. Were there any buildings on it?
A. Yes, sir, there was.
Q. What buildings were there?
A. There was the west building was there, and the other building was moved from the east part of the lot over on to this lot.
Q. Well, when you bought it was there only one building on it?
A. There was one building on the lot, and there was one building on the lot adjoining east of that, and that was moved over off to the other lot.
Q. Mr. McIntyre how much did you pay for that property when you bought it, do you remember?
A. I can tell you in a minute. (Witness refers to paper.) $2,535.20.
[fol. 795] Q. You afterwards sold part of your land to Mr. Boshart, did you?
A. Yes, sir.
Q. So that the land that you now claim is only the western half of the land?
A. The western half.
Q. Of the land which you originally bought?
A. Yes, sir.
Q. Was there any celler under the building standing when you bought it?
A. No, sir, none at all.

Q. Did you afterwards dig a cellar?
A. I did.
Q. About when did you dig the cellar?
A. About 1905.
Q. 1905?
A. Yes, sir.
Q. When you dug that cellar how far down did you dig?
A. Somewhere about 4 feet.
Q. And what did you come to?
A. Came to water.
Q. You dug until you came to water?
A. Yes, sir.
Q. You dug that cellar under your entire building?
A. Yes, sir.
Q. Now, do you know whether one of the pits which has been dug on this property is located where that cellar was dug?
A. It is located a little east of it.
Q. Well, is there any pit located where your cellar was?
A. No.
Q. There isn't any pit?
A. No, there is none there.
Q. At the time that you dug that cellar what did you do with the earth that you took out of it?
A. Well, graded it off.
Q. On your land?
A. On the land, yes.
Q. You graded this on your land?
A. Yes, sir.
Q. Now your property was taken over by the city at the time they took over all this property, was it?
A. It was.
[fol. 796] Q. And was the building at that time torn down by the city?
A. No, sir.
Q. What?
A. I moved it off.
Q. Oh, you moved it off?
A. In 1915.
Q. Well, what was done with the cellar after the city took over your property?
A. The City of Rochester filled it up.
Q. The city filled it in?
A. Graded it up, yes.
Q. Filled in the cellar?
A. Yes, sir.
Q. When was it that the city filled it in, do you know?
A. I couldn't tell you the exact date; I haven't got the date.
Q. Well, it was after the city took it over?
A. It was after they took it over.
Q. The city took it over in about 1920?
A. I don't remember exactly that date.

Mr. Sutherland: Well, that's conceded, isn't it?

Q. You moved your house off some time before that?
A. Yes; in 1915 when I took this house off.
Q. So at the time the city took it over you had no building on the lot?
A. No buildings on it.
Q. When did you sell the adjoining lot to Mr. Boshart, the east half of your lot to Mr. Boshart?
A. Some where along ten or eleven years ago.
Q. Was there any building on that at the time you sold it to him?
A. There was.
Q. Was there a cellar under it then?
A. There was.
Q. Did you dig that cellar?
A. I did.
[fol. 797] Q. How far down did you dig that cellar?
A. I should judge about four feet, some where along there.
Q. And what did you come to when you dug down?
A. I came to water.
Q. After you sold this to Mr. Boshart did he build any further buildings on it?
A. Mr. Boshart built an addition on to it.
Q. And did he dig any cellar?
A. He did.
Q. Did you dig the cellar under the entire building that was on it when you sold it to him?
A. Yes, it was.
Q. When he dug a cellar it was under the addition, is that it?
A. Under the addition, yes, sir.
Q. Were you there when he dug this cellar?
A. I was around there, yes.
Q. Well, you took no part, you don't know what he found?
A. No, I do not.
Q. Do you know whether the cellar covered the entire width of his property at the time the city took it over?
A. I think not quite.
Q. There is no building on what is his property now, there is no building on what was Mr. Boshart's property now?
A. Oh, the city tore it down.
Q. The city tore it down?
A. Yes.
Q. What did they do with the cellar?
A. Filled it in.
Q. So there is no hole there now at all?
A. It is graded off.
Q. What did you do with the earth that you took out of your cellar which you dug on the property which you afterwards sold to Mr. Boshart?
A. Graded it off.
[fol. 798] Q. Graded on the same lot?
A. Yes.

Q. You didn't car- it away?
A. Not that I know of.
Q. Where do you live now, Mr. McIntyre?
A. 217 Beach Ave.
Q. Charlotte?
A. Charlotte, yes.
Q. How long have you lived there, in Charlotte I mean?
A. Since 1887.
Q. How old are you, Mr. McIntyre?
A. 83, past.
Q. And you have lived continuously at or near this property since 1887?
A. I lived on the property south of Beach Avenue.
Q. You have lived on Beach Avenue ever since 1887?
A. Yes, sir.
Q. And you have been familiar with this property, all of this property ever since that time?
A. Quite familiar.
Q. Well, now, during any of that period that you have been familiar with it was there any earth drawn upon any of this property north of Beach Avenue for the purpose of filling it in?
A. I think there has a little.
Q. Where was that drawn?
A. It was right north of my building; I think Mr. Boshart filled in and graded up a little.
Q. Who filled in?
A. Boshart.
Q. Boshart filled in a little?
A. Yes. He graded up there a little.
[fol. 799] Q. On Boshart's lot?
A. Yes.
Q. Was there any filling done during any of that period on the Bartholomay property?
A. Not that I know of.
Q. At the time you bought this property on Beach Avenue, including that that was taken over from you by the city, and also Mr. Boshart's property, what was its condition? Was it dry land or was it marshy?
A. Dry land.
Q. Was the building that was on it then a new building or an old building?
A. An old building when I went there.
Q. An old building?
A. Yes.
Q. Well, can you give any idea of how old a building it was?
A. Oh, I should judge five or six years old, if not more.
Q. If not more?
A. Yes.
Q. What purpose had it been used for before you bought it?
A. Ice cream and confectionery store on there.
Q. Oh, it was a store building?

A. Well, they used it for that, I think.
Q. It was not a residence property?
A. Well, Mr. Boshart wasn't a resident not until after.
Q. Was the building on your property a residence building before you bought it?
A. No, it was used for an ice cream and candy and confectionery.
Q. When you dug the cellar for your building and also the building on the property you afterwards sold to Mr. Boshart, what was it that you dug out of the cellar, what was the character of the soil?
A. It was gravel and sand.
[fol. 800] Q. Gravel and sand?
A. Yes.

Mr. Moser: That's all, I think. You may cross-examine.

Cross-examination.

By Mr. Oviatt:

Q. You say that the pits that were dug there were not in the cellar but were east of the cellar?
A. A little east, yes.

Mr. Moser: Now, he didn't say the pits; he said the pit.
Mr. Oviatt: The pit.

Q. There isn't any pit there, that is, in the place where the cellar was?
A. None at all.
Q. In other words the cellars and the pit are different areas?
A. Yes, they are different.
Q. And how near to the nearest cellar is any of these pits?

Mr. Moser: There is only one pit, I say.
Mr. Oviatt: Wait just a minute.
Mr. Moser: I object to that. He has only testified about one pit on his property.
Mr. Oviatt: Your Honor, I think my question is proper.
The Master: I believe that is proper cross-examination.

A. I think about six feet east of the building.
Q. So that the nearest cellar to any pit is six feet away?
A. Well, I think it is.
Q. Where did Boshart get the soil that he made the fill with?
A. I couldn't tell you.
[fol. 801] Q. And where did he fill, to the north or the south or elsewhere with reference to his building?
A. I think west and south.
Q. West and south? And how long ago did he make the fill?
A. How long ago did he—I beg your pardon.
Q. When was it that he made the fill?
A. Somewhere about a year after he bought it, about a year after, I guess, after he bought it, on or about that.

Q. And had there been previous fills so far as you know where Boshart filled?

A. There had been a little grading there, that was all that I know of.

Q. Was dirt or material brought from somewhere else?

A. Yes.

Q. And how long before Boshart made his fill had this material and dirt been brought from somewhere else to grade?

A. I don't know where he got it.

Q. Well, you say that Boshart made a fill?

A. He graded up a little, yes.

Q. And before Boshart did that there had been materials to the lot by someone else before Boshart did it, had there?

A. Not that I know of.

Q. Not that you know of?

A. No.

Q. You say that you bought the lot in 1888?

A. Yes, sir.

Q. And you sold to Boshart in what year?

A. Along about ten or eleven years ago.

Q. Now during the time that you owned the property did you do any improving there of any kind by filling in?

A. Well, Beach Avenue was raised there, there was a hill there and it was raised up, raised up about a foot or more, the street was. [fol. 802] Q. Where did you get the material to fill in there?

A. I couldn't tell you now.

Q. Do you remember when you did it?

A. I couldn't give you the dates.

Q. Well, do you remember when it was that Beach Avenue was raised?

A. I do not.

Q. Can you tell us whether it was along in 1895 or not?

A. 1895? I couldn't say.

Q. Do you remember about how long it was after you bought the property that they raised Beach Avenue?

A. I couldn't give you the date.

Q. No, but you know whether it was two years or five?

A. I couldn't tell you the exact date.

Q. Could you say it was less than ten years after you bought the property that they raised Beach Avenue?

A. I couldn't tell you.

Q. Well, when they raised Beach Avenue there, who did that?

A. The village of Charlotte.

Q. And where did they get the materials to raise Beach Avenue?

A. Oh, they got it—come to think, they got it off the top of the hill there.

Q. What kind of material was it?

A. Mostly clay, I should say.

Q. And for how long a distance did they raise Beach Avenue?

A. I couldn't tell you the distance.

Q. Was it from your place to Lake Avenue?

A. No, they didn't go as far east as that.

[fol. 803] Q. How near Lake Avenue did they go?

A. I don't think they went over 100 feet east of my place there.

Q. And where did you get the material that you filled in your lot with?

A. I couldn't tell you that.

Q. And whereabouts on your lot did you fill it in at the time they raised Beach Avenue?

A. On the front and the side.

Q. And where they raised Beach Avenue, had the old Beach Avenue sunk down and become soggy?

A. No, it was a hard bottom.

Q. Hard bottom?

A. Filled in with flag.

Q. Filled in with flag?

A. Yes.

Q. That is, the Beach Avenue was a flag surface before they filled it in for this foot?

A. Yes, sir, mostly.

Q. And do you know when that flag had been filled in there before they raised Beach Avenue, after you bought this property?

A. I didn't catch on to that.

Q. You say they raised Beach Avenue, and the previous Beach Avenue had a flag surface?

A. Yes, sir.

Q. Do you know when they made that flag surface?

A. No, I couldn't tell you the date.

Q. That's before your time, before you purchased your property?

A. Oh, since I purchased the property they filled in the flag.

Q. And when you dug your cellar did you find any flag on your lot?

A. No, sir.

[fol. 804] Q. And did you know of their having filled in the Bartholomay property east of yours when they raised Beach Avenue?

A. No, sir.

Q. Did they raise Beach Avenue along in front of the Bartholomay property too?

A. I think not but a little ways, if they did.

Q. And you don't remember the Bartholomay people filling in at that time?

A. No, sir.

Mr. Oviatt: That's all.

Redirect examination

To Mr. Mosher:

Q. Mr. McIntyre, you said the pit that was dug on your property is about six feet away from where your cellar was?

A. Just about.

Q. Now, do you know where the pit on Mr. Boshart's property is with reference to where his cellar was?

A. That's right nearly on the east part somewhere.

Q. Well, do you know? I am just asking you whether you know whether the pit on Mr. Boshart's property is dug where his cellar was, do you know anything about it?

A. No, it wasn't dug where his cellar was.

Q. How far away from where his cellar was?

A. It was a little east of there.

Q. How far?

A. I couldn't tell exactly; I should judge about ten or twelve feet.

Q. During any of the time that you owned this property did anybody else claim to own it, so far as you know?

A. No, sir.

[fol. 805] Q. Anybody ever make any claim on you that you didn't own it?

A. No, sir.

Q. Terry Park lies just to the west of your property?

A. Yes, sir.

Q. You have been familiar with that ever since 1887?

A. Yes, sir.

Q. When you first went down there what was the character of the Beach at Terry Park?

A. Sand and gravel and cobble stone front, that is, in the water, cobble stone water front.

Q. Now, are those cobble stones visible today?

A. No, sir, they are not.

Q. What has become of them?

A. Covered up with sand, lake sand.

Q. Now, during that period since 1887 has there been sand drawn away from Terry Park?

A. There has.

Q. When was that drawn away?

A. Somewhere about 1908.

Q. What?

A. About 1908, I think.

Q. 1908?

A. Yes.

Q. And for how long a period was sand drawn away from there?

A. It was drawn there for a number of years.

Q. For a number of years?

A. Yes, sir.

Q. How many years, five or ten?

A. I should judge about four or five years.

Q. Who was drawing it away?

A. The furnace company in Charlotte.

[fol. 806] Q. And what did they draw it away with, what did they use to draw it away?

A. They used wagons to draw it with.

Q. What time of the year did they draw it?

A. Generally in the Fall.

Q. For how long a period in the Fall would they draw it?
A. Oh, I should say perhaps a couple of weeks.
Q. How many teams did they have drawing it, do you know?
A. I should judge about ten.
Q. Have you any idea how many wagon loads of sand they drew away from there?
A. How many?
Q. How many wagon loads of sand did they draw away?
A. I couldn't tell you.
Q. They had about ten teams drawing at a time?
A. Yes, sir.
Q. And they drew it from the beach up to the furnace?
A. Yes, sir.
Q. For several weeks in the Fall, did you say?
A. Yes, about four weeks, I should say.
Q. About four weeks in the Fall for several years. Where did they get that sand, right down on the beach?
A. On the beach.
Q. Shovelled it right out of the beach into the wagon?
A. Yes, right down to the water grade.
Q. When they shovelled it away would they dig a big hole there?
A. No, they left it pretty level.
Q. But they shovelled it off of the top?
A. Shovelled it right off of the top.
[fols. 807 & 808] What, if anything, would happen in reference to that beach where they would shovel it off?
A. The sand would drift in there and fill it in again.
Q. So that the next year you would no- know it had been taken out?
A. So that the next year you would not know it had been taken out.

Mr. Oviatt: Won't you desist from leading?

By Mr. Oviatt:

Q. Then, afterwards, the blast furnace got into trouble and there was a lot of flag put back in again?
A. Flag in where?
Q. They put a lot of flag back into Terry Park?
A. Back into Terry Park?
Q. Yes. The blast furnace was compelled to draw back a lot of stuff?
A. They might to fix the road.
Q. Didn't they dump a lot of flag back in Terry Park afterwards?
A. I think they dumped on the driveway. They went out and in and it got so muddy where they had to fill in, they filled in some flag that they had dumped there.
Q. I know, but there was a lawsuit resulted after they had taken sand out of there.
A. I think there was an injunction served on them and they stopped.

Q. Then they were compelled to take back flag and fill it in again?
A. No, sir, I think not.
Q. Do you remember their filling in there at all?
A. No, sir, not after they quit drawing.

[fol. 809] ARGUMENT OF COUNSEL

Mr. Poole: If the Court please, I would like to make an amendment on the record. The defendants Emil and Rebecca Boshart desire to place on the record an amendment to their answer filed herein by adding thereto a new paragraph numbered Seventeen and to read as follows:

"17. These defendants further allege that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835, it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided, that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts, unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall have first approved, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

They allege that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by these defendants, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which these defendants deny), such title and right of action first accrued more than twenty years prior to the commencement [fol. 810] of this action, and that the Commonwealth was disseized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by these defendants and their predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was the Commonwealth, or those from whom or through whom it claims, seized or possessed of any part of said lands."

Mr. Poole: I make another motion. The defendants Martin J. and Belle McIntyre desire to place on the record an amendment to their answer filed herein by adding thereto another paragraph numbered 17 and to read as follows:

"17. These defendants further allege that, by an act duly passed by the General Court of the Commonwealth of Massachusetts in the year 1835 it was enacted and resolved, and ever since the year 1835 the statutes and ordinances of the Commonwealth of Massachusetts repeatedly re-enacted and affirmed by said General Court have provided that no action for the recovery of any lands shall be commenced by or on behalf of said Commonwealth of Massachusetts unless such action shall be commenced within twenty years after the title and right of the Commonwealth to commence such action shall [fol. 811] have first accrued, or within twenty years after the Commonwealth, or those from whom or through whom it claims, shall have been seized or possessed of the premises.

They allege that, if the Commonwealth of Massachusetts ever had any title to the premises described in the complaint and in which title or interest is claimed by these defendants, or if the said Commonwealth ever had any right to maintain a suit for the recovery thereof (which these defendants deny), such title and right of action first accrued more than twenty years prior to the commencement of this action, and that the Commonwealth was dis-seized of said premises more than twenty years before the commencement of this action, during all of which period of more than twenty years, said lands were actually and exclusively and openly possessed, held, and occupied by these defendants and their predecessors in title under a claim of title and with an uninterrupted possession and occupancy adverse and hostile to any title or right therein, or in any part thereof, of the Commonwealth of Massachusetts, and that at no time during said period of more than twenty years prior to the commencement of this action was the Commonwealth or those from whom or through whom it claims, seized or possessed of any part of said lands."

Mr. Oviatt: We make no objection to that amendment. Strictly speaking they would have to ask permission from the Supreme Court I suppose, but I shall make no objection.

Mr. Beach: Referring to the records which we produced this morning of Mr. Mushette of the New York Central showing the comple-[fol. 812] tion of certain work on the center pier of the Rome, Watertown and Ogdensburg bridge at Charlotte, I read the following, being an excerpt from the original records which were produced in Court, referring to the work done on that pier: "Completed driving piles on April 28, 1919; completed metal sheeting on August 1, 1919; completed timber sheeting on July 25, 1919."

Mr. Oviatt: The objection to the testimony produced from the records as if it had been read from the records, is withdrawn.

Sandys B. Foster, being sworn on behalf of the defendants, examined by Mr. Moser, testified as follows:

Q. Mr. Foster you are President of the Bartholomay Company, Inc., one of the defendants in this action?

A. Yes sir.
Q. How long have you been connected with that company?
A. Twenty-six years.
Q. Since what date?
A. The first of July, 1897.
Q. Have you been President during all that time?
A. No sir.
Q. How long have you been president?
A. It will be 18 years——
Q. Prior to that time what was your connection with the company?
A. Probably secretary or treasurer.
Q. The Bartholomay Company Incorporated is the present name of the company which used to be the Bartholomay Brewery?
A. Yes.
Q. And the name of the corporation was changed?
A. Yes.
[fol. 813] Q. The Bartholomay Brewery was a reorganization of a former company known as The Bartholomay Brewing Company?
A. Yes.
Q. And the Bartholomay Brewing Company which became the Bartholomay Company Incorporated, of which you are the President, acquired these premises in question about what time?
A. 1889.
Q. That was about eight years before you came here?
A. Yes.
Q. You, of course, do not know what your company paid for the property?
A. No sir.
Q. Tell us whether or not the company of which you are now the president has been continuously in possession of these premises ever since you came here in 1897, that is the premises claimed by the Bartholomay Company Incorporated in this proceeding.
A. They have, until the time the city took them in 1919.
Q. That is when the city took them over under the condemnation proceeding?
A. Yes.
Q. Since you have been connected with the company or at any time prior thereto, do you know of any claim that has been made against your company as to the title of these premises, any claim adverse to your company?
A. No sir.
Q. Now since you became connected with the company in 1897, tell us how much your company has expended by way of permanent improvements on that property, on construction or otherwise?
A. In the neighborhood of $46,000.
[fol. 814] Q. During that same period has your company paid all the taxes on that property?
A. All that I know to be levied.
Q. How much has your company paid in taxes during the period that you have been connected with it?

A. In the neighborhood of $45,000.

Q. Prior to the time that you came here of course you have no personal knowledge of what was paid by the company by way of taxes or improvements?

A. No sir.

Q. Is there any officer of the company now was connected with it before you were?

A. No sir.

Q. Tell us also whether at any time since you have been connected with the company there has been any filling in of the lands by the Bartholomay Company, of the lands in question.

A. No there has not.

Q. Will you tell us generally the nature of the improvements that you made there?

A. The old Hotel property was divided into cottages, new cottages were built and sidewalks were laid, shrubs were planted.

Q. You built some roads and tennis courts etc?

A. Yes, tennis courts were put there and roadways were built into the property. Of course the cottages were all improved with electric lights, sewerage and toilets etc, made strictly habitable.

Q. You at one time had a pavilion there. Did your company build that pavilion?

A. It was built before I came in to the company.

Q. That is there were considerable improvements made there be- [fol. 815] fore you became associated with the company?

A. That pavilion was in existence before I came in to the company.

Q. And you say something about the hotel having been separated into cottages, that is what is known as the Cottage Hotel?

A. Yes.

Q. And that was there before you became connected with the company?

A. Yes.

Q. That was a building of considerable size?

A. Yes.

Mr. Moser: That is all.

Mr Oviatt: No questions.

CHARLES SALMON, witness sworn for the defendants, examined by Judge Sutherland, testified as follows:

Q. Mr. Salmon where do you reside?

A. Summerville, Irondequoit.

Q. You were formerly a merchant in Rochester for many years were you?

A. Yes sir.

Q. How long have you had your residence at Summerville?

A. In the summer time since 1878.

Q. And Summerville is just across the Genesee River from what we call Charlotte is it not?

A. Yes sir.

Q. You have been the owner of considerable property on the east side of the river have you not, at one time or another?

A. Yes sir.

Q. Near the mouth of the river?

A. Yes sir.

Q. When did you come to Rochester to live, Mr. Salmon?

[fol. 816] A. What do you mean by that?

Q. When did you come here to live in Rochester?

A. 1863.

Q. And you have lived in this vicinity ever since have you?

A. Yes sir.

Q. When did you first become acquainted with conditions at the mouth of the Genesee river on the shore of the Lake?

A. In 1865.

Q. How much of an observation did you make of conditions there in those early years? Did you go there frequently or infrequently?

A. In the summer time perhaps once or twice a week.

Q. What occasion did you have for visiting there in those early days?

A. I was clerk for a grocery store and they sold Mr. McIntyre goods and I used to deliver them down there.

Q. That is Martin McIntyre?

A. Yes sir.

Q. Did you know Mr. Samuel Wilder?

A. Yes sir.

Q. Did he have a cottage down at the Lake?

A. Yes sir.

Q. How about delivering groceries at his house?

A. I don't think I ever delivered any there.

Q. You began delivering at McIntyre's in 1865?

A. Yes, before that, '63, '64 and '65.

Q. Did you know a Mr. James Whitney?

A. There were two James Whitneys, I don't know which one you mean.

Q. I mean the one who owned property on the east side of Lake Avenue or the boulevard?

A. Yes, I knew him.

Q. Whitney had a house did he not, down there on his land?

[fol. 817] A. Yes sir.

Q. West of Lake Avenue?

A. West of the boulevard, yes,

Q. Where the Bartholomay people afterwards purchased?

A. It was on part of that ground, yes sir.

Q. Did you deliver any goods at Mr. Whitney's?

A. Yes sir.

Q. You have been in and out of McIntyre's place then frequently?

A. Two or three times a week, yes.

Q. Did you drive your delivery wagon up to his door?

A. Yes sir.

Q. By what method of approach did you go to the McInytre Hotel or cottage?

A. We went down the boulevard to the sandbar and crossed the sandbar to his cottage.

Q. Now did the road from Lake Avenue out to McIntyre's shack or cottage, have any name at that time; was it called anything?

A. No I don't remember any name, only McIntyre's.

Q. I mean the road, was it then called Beach Avenue?

A. I don't think so.

Q. What was the character of that drive way from Lake Avenue eastward to McIntyre's place?

A. Sand.

Q. Any filling of any sort put in there, any gravel, or cinders or anything of that sort?

A. Not at that time, no sir.

Q. How far from the edge of Lake Ontario was McIntyre's cottage standing when you first saw it in 1864 or 1863 whichever it was?

A. Well that would be guess work Judge. I have never measured it, I should say 150 to 200 feet.

Q. What was the character of the soil on which McIntyre's [fol. 818] cottage stood?

A. Sand.

Q. What was the character of the soil surrounding McIntyre's place?

A. There was nothing but sand there

Q. And from his place out to where the lake was, was that sand also?

A. Yes sir

Q. How about the uniformity of that character of soil from McIntyre's place to Lake Avenue?

A. Nothing but sand.

Q. Nothing but sand, no fill on it that you could see of any sort?

A. No, sir.

Q. Did that driveway or approach that you drove your delivery wagon over, have any bridge that it crossed on the way from Lake Avenue to McIntyre's cottage?

A. Why I think there was a little bridge across Lake Avenue. I don't remember distinctly about that.

Q. That was on Lake Avenue?

A. Yes.

Q. I am not speaking about that, I am speaking about the road from Lake Avenue. After you left Lake Avenue to go to McIntyre's, between Lake Avenue and McIntyre's was there anything in the nature of a bridge there?

A. I don't remember any bridge there, no sir.

Q. From McIntyre's cottage eastward to the pier, what was the nature of the soil?

A. That was sand too.

Q. Did that reach up to the pier?

A. There wasn't very much of a pier at the end of that. There was a sort of a pool there where rowboats used to put in.

Q. Where was that pool that you are now speaking of where row-
[fol. 819] boats went in, with reference to McIntyre's cottage?

A. East of McIntyre's cottage.

Q. How was it as to the north and south direction, was it south or north of McIntyre's?

A. It was a little north of McIntyre's not very much.

Mr. Sutherland: Let us see the map in regard to that.

Mr. Oviatt: Objected.

Mr Sutherland: I will withdraw the question.

Q. Do you remember when the Spencer House was built?

A. Yes.

Q. With reference to the location of the Spencer House, where was this pool?

A. South of it, south and a little east.

Q. South and a little east?

A. Yes, a little east.

Q. What was the connection between that pool and the river as you remember it?

A. If there had ever been a pier there it was broken away. I think it was broken on the two sides.

Q. Do you remember whether after that break had remained there a time, there was anything in the nature of a bridge put over that opening, so that one could walk along the pier without falling into the brink?

A. No I don't remember anything of that kind.

Q. Now is the pool which you say was south and east of the Spencer House the same pool that you say was east and north of McIntyre's?

A. Yes, the same pool.

Q. The pool did not change its position from McIntyre's time until the Spencer House was erected?

A. No sir.

[fol. 820] Q. Was there any connection between that pool and Lake Ontario?

A. No sir.

Q. Do you remember anything in the nature of a ditch or water course leading from Lake Avenue eastward into that pool south of the location of the McIntyre or Spencer House?

A. There was what we used to call McIntyre's ditch there and that ran down to this pool, so that while it was south at McIntyre's, it was north after it passed there, north and east.

Q. Do you know where the water came from that ran into that ditch?

A. It came partly from the boulevard and partly down—it was a slope from the the railroad down to this ditch,—and in the Spring of the year the river would overflow and water would go into it.

Q. Did any lake water get into that pool?
A. I don't see how it could.
Q. Did any lake water get into McIntyre's ditch?

A. No, there was a sandbar in between.
Q. Did you ever follow up the course of the McIntyre ditch on the west side of the boulevard to see where the water came from originally?
A. No, I did not.
Q. Did you have any knowledge of any water course west of Lake Avenue that flowed north and then turned across Lake Avenue, into this McIntyre ditch?
A. There was a water course down there. I don't remember whether it went directly to the Lake or whether it went across Lake Avenue.
Q. You don't remember whether that was the source from which water eventually got into the McIntyre ditch?
[fol. 821] A. No I do not know personally about that.
Q. Did you ever see any water in the McIntyre ditch at all?
A. Yes sir.
Q. How much water?
A. A little stream.
Q. Well describe it so we will get some idea of its size?
A. That varied. After a rain it would be almost full, but ordinarily it was just a little stream trickling down.
Q. How big a ditch was that?
A. Probably a foot wide at the botom and perhaps two feet wide at the top.
Q. What was the nature of the edge of this ditch. Was there any vegetation growing?
A. Willow trees mostly.
Q. Any small vegetation; any swamp grass growing along the edge of the ditch?
A. Yes, there was grass and weeds growing there.
Q. Was there anything to show that there had been anything thrown out of the bottom of the ditch by way of a little elevation on each bank of the ditch?
A. Yes in some places.
Q. The ditch had been dug before you went there?
A. Yes sir.
Q. Now the character of the land between the ditch and McIntyre's cottage or between the ditch and the Spencer House was what? What was the nature of the soil?
A. Between McIntyre's and the Spencer House was sand, and further west was harder dirt.
Q. How far west would you have to go before you got into the harder dirt?
A. I couldn't give any dimensions on that, it was a rise of ground [fol. 822] there and that was hard dirt. It was probably 100 to 150 feet perhaps.

Q. You spoke of some water getting into this McIntyre ditch from the Boulevard. As you go north today and approach the present line of Beach Avenue, how is the level of Lake Avenue, does it go down hill or up hill, or is it on a level?

A. It goes down.

Q. Now when you say that water ran from the Boulevard into McIntyre's ditch, will you state from what area or watershed that water came?

A. From where the present Rome and Watertown Railroad is.

Q. All the way down the hill until it struck a flat surface where McIntyre's ditch was?

A. Yes.

Q. So that in time of rain, the water would come down that hill and find an outlet in McIntyre's ditch?

A. Yes.

Q. Which ended in the pool next to the river pier?

A. Yes.

Q. How frequently, speaking generally, have you observed the conditions at the Beach from the Sixties down, from the time you began delivering groceries to the present time, how much have you seen the Beach, every year?

A. Yes.

Q. Many times?

A. Yes I lived down there and done a lot of work there.

Q. To your knowledge, has the land where the Spencer House stood and where McIntyre's shack was, has that ever been overflowed from Lake Ontario?

A. I think not, not in my time.

Q. Whenever you have seen it, it has been dry land?

[fol. 823] A. It has been sand, yes sir.

Q. Between Lake Avenue and the pier, was there any path leading from the south that crossed McIntyre's ditch that you remember. Was there any trail or foot path from the south?

A. I have a dim recollection that there were planks across Broadway as we call it now; taking the water from the south outlet into the McIntyre ditch, but I am not dead sure about it.

Q. Well there are other witnesses that testified to a bridge on Lake Avenue, under which this McIntyre ditch crossed from the west to the east?

A. I think there was.

Q. You remember such a bridge there, do you?

A. Well, it is not very distinct to me.

Q. Speaking generally, Mr. Salmon, from the Sixties down to the present time, what is the fact as to whether the shore line west of the pier out to Lake Avenue and farther west from that has remained stationary or whether it has been progressing to the north, what is the fact?

A. It has progressed to the north.

Q. That you have actually observed?

A. Yes.

Q. Have you observed, Mr. Salmon, the action of the waves with reference to casting up timbers or logs upon the shore?

A. Yes sir.

Q. What have you observed in that regard?

A. Why I have had to remove logs. On particular year, I don't remember the year, there was a log thirty feet long and 2 feet or two [fol. 824] and a half feet through it, throwed up on the beach up to the steps of my cottage over on the east side of the river.

Q. How far back from the water's edge was that?

A. Perhaps two hundred and fifty feet at that time?

Q. How was that log cast up?

A. In storm by the water.

Q. So that this log in a storm was carried by the waves and deposited two hundred and fifty feet inland from the place where the edge of the water would be when the water was still?

A. Yes, about that.

Q. Your cottage was east of the river?

A. Yes sir.

Q. What is the nature of the beach there along which this log was propelled by the waves, as compared with the beach west of the pier?

A. Sand.

Q. The same general nature?

A. The same general nature.

Q. Have you seen logs and planks cast up by the waves on the sand area west of the pier?

A. I have, a little farther up. There is what we call the Park up above there. I have seen logs blown in there.

Q. Into Terry Park?

A. Yes in to Terry Park.

Q. How far back from the water's edge?

A. About the same distance it was over to my cottage.

Q. Do you remember a roadway leading to the Lake being obstructed with logs at one time, east of the river?

A. On our side of the River?

Q. Yes.

A. Yes sir.

Q. How far back from the water's edge were the logs thrown?

[fol. 825] A. That was not nearly as far back. That was probably 100 to 125 feet back.

Q. What was the size of the logs that were thrown back there?

A. They were good sized ones. We had to have a team to move them.

Q. A man could not move them without help?

A. No sir.

Q. How high above the actual level of the lake when it was still, were those logs depoisted by the waves?

A. I could not give the dimensions, but I should say two feet or two feet and a half.

Q. Mr. Salmon, have you observed the action or the effect of the

wind in blowing the sand back from the water's edge, back on to the land itself?

A. Yes sir.

Q. Speaking generally, have you observed that process going on through all these years?

A. Yes sir I have.

Q. How far back will the sand be carried by the force of the wind?

A. As far back as it carried the logs and perhaps a little farther; 250 to 300 feet.

Q. What is the effect on the heighth of the sand by the blowing back of the sand as you have described?

A. What do you mean?

Q. The sand that is blown back on to the land is deposited on the land?

A. Yes sir.

Q. And left there?

A. Yes sir.

Q. What is the effect in the way of raising the level?

A. Why it raised the level.

[fol. 826] Q. How much have you seen the level of the sand raised, we will say during a Fall and Winter season?

A. I don't know as I could tell.

Q. Would it amount to feet or only inches?

A. No, probably inches in one season.

Q. Do you know whether or not at the present time the city of Rochester is maintaining any sand guards at the beach?

Mr. Oviatt: I object to that. I expect that the counsel is going to call our sea wall a sand guard.

Mr. Sutherland: O-, no, I mean these wooden horses, that look like snow horses along a railroad; I am not talking about a cement wall.

(To the witness:) Have you seen any of those?

A. No sir.

Q. Along south of McIntyre's ditch I don't think I asked you about. South of McIntyre's ditch, how far have you walked on the territory between Lake Avenue and the river? How far have you, yourself, walked?

A. From the railroad down to the little pool.

Q. Where was the railroad at that time?

A. Where it is now, south of the furnace. I am speaking of the Rome and Watertown railroad.

Q. You walked from where the Rome and Watertown tracks go, east and west, on dry land?

A. Yes sir.

Q. Down to the pool?

A. Yes sir.

Q. How big was this pool as you remember it?

A. Probably 30 by 16, I should think that was about the size of it.

[fol. 827] The Master: Of what time is he speaking now?
Mr. Sutherland: When was it that you made that journey?
The Witness: When I went down there?
Mr. Sutherland: Yes.
The Witness: When we had to cross the river to get there. It was in '75 and '76.
The Master: That is to say, he means us to understand that the pool in 1875 was about 30 by 16.
The Witness: Yes sir.

Q. And you walked in 1875 on dry land?
A. Yes sir.
Q. From where the Rome and Watertown Railroad now is, to the north to the pool?
A. Yes sir.
Q. Do you remember when the railroad, the New York Central Railroad, was extended north?
A. Yes
Q. When was the Rome and Watertown built, do you remember, Mr. Salmon?
A. I think the bridge was built in 1872.
Q. Do you remember when the single track was extended until its northern terminus was just south of where present Beach Avenue now is?
A. I do, yes.
Q. Did you go down, and disembark from trains when the terminus was at that point?
A. Yes sir.
Q. What was the condition of the land from that terminus north to the lake?
A. We went down that way to go across the river.
Q. When you wanted to get to the Ferry boat?
A. There was no Ferry boat at that time.
[fol. 828] How did you get across the river?
A. With a boat.
Q. By row boat?
A. Yes.
Q. Where did you take that row boat?
A. At the pool.
Q. Any difficulty in getting from the railroad terminus over to the pool?
A. No there was dry land to go one way, and part of the way there was some swamp.
Q. Where was the swamp?
A. East of where we walked down, and nearer the river.
Q. How much of a swamp area was there east of the path that you took from the railroad terminus to the pool, how much of a swamp area was there?
A. Part of the year there wouldn't be any swamp and part of the year there would.

Q. Was that just next to the pier?
A. No, there was dry land between that and the pier.
Q. How much of a swamp in area was it, would you say?
A. O-, I couldn't tell you.
Q. Do you know where the water came from that was in that swamp?
A. It was drainage of the up ground.
Q. South of it?
A. Yes.
Q. Was there any connection between that and Lake Ontario, that swamp?
A. No, it connected with the river.
Q. Now Mr. Salmon have you observed the action of waves and whether they passed up stones and gravel?
A. They do on the lake shore, yes sir.
Q. How extensively have you seen that deposit made there?
A. What do you mean, how thick?
Q. Yes, does it amount to much, or trifling?
[fol. 829] A. Well it is so you can draw it away by the wagon load.
Q. And as to whether that would or would not subsequently be covered with sand?
A. Yes sir.
Q. I asked you, did I not, whether in the course of these years, the edge of the beach has progressed to the north?
A. Yes.

Cross-examination.

By Mr. Oviatt:

Q. Mr. Salmon, in taking the path from the railroad terminus when it was south of new Beach Avenue this path ended at the pool, did it?
A. Why, yes, the path ended there unless you wanted to go on the pier. You could get on the pier and go out to the lighthouse if you wished.
Q. But the path, so far as it was being on land was concerned, ended at the pool?
A. Coming from the south, it did, but you could go west past McIntyre's.
Q. That's on the south side of the ditch?
A. That would be on the west side of the ditch.
Q. Yes. Well, the ditch ran east and west?
A. Well, in a northeasterly direction.
Q. In a northeasterly direction?
A. Yes.
Q. In other words this pool was considerably north of where the new Beach Avenue is now?
A. Yes, I think it was.
Q. And it was also north of the McIntyre cottage?
A. Yes, a little.

Q. So that the ditch from Lake Avenue to the pool ran in a northeasterly direction?

A. Yes, sir.

[fol. 830] Q. And ran by and north of McIntyre's cottage?

A. No, south of McIntyre's cottage.

Q. It ran on the south side of the McIntyre cottage?

A. Yes.

Q. Then the pool was north of the McIntyre ditch?

A. Yes.

Q. So that the ditch ran east of McIntyre's cottage, north through the pool?

A. No, it ran south of McIntyre's cottage.

Q. Yes, it passed McIntyre's cottage on the south?

A. Yes.

Q. But the pool was north of McIntyre's cottage?

A. Yes, north east.

Q. Northeast?

A. Yes.

Q. So, then, the ditch had to run around east of McIntyre's cottage to get to where the pool was?

A. It didn't have to run around; it went on a straight line, straight northeast.

Q. Well, do you know anything about angles? Could you say, that the ditch ran, say, an angle of 90 degrees?

A. I don't know much about angles.

Q. You don't know much about angles?

A. But I should say it was a straight line, northeasterly line from Lake Avenue to the pool.

Q. And you would say that northeast was about a correct description of the direction?

A. Yes, I would.

Q. Now, do you know how far north of Beach Avenue as it now is laid out that the McIntyre cottage was?

A. No. It is pretty hard to tell. Things have so changed there.

Q. I think you said it was 150 to 200 feet from the McInytre cottage across the sand to the south until you got up to the ditch, [fol. 831] or to the lowland, or something of that kind?

A. Yes.

Q. And the ditch there was running northeast and considerably north of Beach Avenue where it now is?

A. No; I should say the ditch was—part of it would be on the present——

Q. Beach Avenue?

A. Beach Avenue.

Q. Well, how far north of the present Beach Avenue was the eastern extremity of the ditch?

A. The eastern extremity?

Q. How far north of Beach Avenue was it?

A. I don't know as I could give that. It is the same distance as it is now from it; the pool was where the present pier is.

Q. How far north from the present Beach Avenue was McIntyre's cottage?

A. I should say part of it was on the present boulevard.

Q. So that the McIntyre cottage, stood in 1863, was about where the present Beach Avenue is?

A. Well, probably a little south of it.

Q. A little south of it?

A. Probably, yes.

Q. Now, your clearest recollection now is that the McIntyre cottage was actually south of where the present Beach Avenue is?

A. Yes.

Q. So that when you left the railroad train at its extremity south of Beach Avenue you went to the McIntyre cottage, or you went to the path along to the pool?

A. Went to the path. There was no McIntyre cottage when the railroad extended down there. That was gone.

[fol. 832] Q. Well, before that?

A. Yes.

Q. Yes, before that. How large was this pool which was northeast of McIntyre's cottage?

A. Why, I said I thought it was 30x16, taking the pier to be 16 feet wide. The pier was all gone and I think the opening was about 30 feet on the river side.

Q. And is this pool which you describe as being 30x16 the pool which you say was south of Beach Avenue and which you walked to from the railroad on the south on dry land?

A. I didn't say it was south of Beach Avenue; it was the end of Beach Avenue.

Q. Well, did you testify to any pool south of Beach Avenue?

A. Only an occasional pool.

Q. An occasional pool?

A. Yes.

Q. That is, you don't know of any pool which existed throughout the year south of Beach Avenue?

A. No, I do not.

Q. Do you know of any swamp which existed south of Beach Avenue?

A. Part of the year, yes.

Q. Part of the year?

A. Yes.

Q. And this McIntyre ditch was about two feet at the top?

A. Where it was level ground, where they had cut through—oh, it was wired at the top but about two feet wide at the bottom.

Q. And how deep was it?

A. Well, that varied too.

[fol. 833] Q. About how deep was it?

A. Oh, some places three feet, some places probably not over 15 or 18 inches.

Q. And when you wanted to get to McIntyre's cottage you drove down Lake Avenue and then turned east along the McIntyre Road which led directly to his cottage?

A. Yes.

Q. McIntyre's cottage, you say, was about where Beach Avenue is now?

A. Well, I should say it was pretty near, probably a little south of it.

Q. A little south of it?

A. I think so.

Q. So that the road that you turned on to from Lake Avenue to go east to McIntyre's cottage was a little south of where the present Beach Avenue is?

A. The road I should say was about where the present road is.

Q. Yes, that is the present Beach Avenue running to the ferry?

A. Yes.

Q. So, that when going from Lake Avenue east to McIntyre's cottage you went either along the place where the present Beach Avenue is, or a little south of it, because McIntyre's cottage was south of the present Beach Avenue?

A. Yes.

Q. Is that right?

A. Yes.

Q. Therefore, the McIntyre ditch was considerably south of where the present Beach Avenue is?

A. Quite a little, yes.

Q. And how far south of the present Beach Avenue would you say the McIntyre ditch was, in fact?

A. Why, it crossed over. At McIntyre's it was only a few feet from the rear door.

[fol. 834] Q. When you are speaking of the present Beach Avenue you are talking about the road that runs to the ferry, are you not?

A. Yes, sir.

Q. And the road which runs to the ferry which is now operating?

A. Yes.

Q. That is the street with reference to which you have made all your answers when I have used the term Beach Avenue?

A. Well, when you speak about the old Beach Avenue, the old roadway that we used to drive was further north than that.

Q. How far north?

A. Well, I couldn't tell you exactly. As you say, the changes have been so great that I couldn't tell just exactly, but it was quite a little north of the present driveway, and the ferry landed farther north than it does now.

Q. You have testified that the McIntyre ditch was south of the present Beach Avenue, have you not?

A. If I have I didn't mean to; I meant to have it south of the old driveway.

Q. Well, then, how far north of the present Beach Avenue was the McIntqre ditch at its eastern extremity?

A. How far north of the present view?

Q. Yes, sir.

A. Why, I should say 100 or 125 feet.

Q. Now, you understand what I'm talking about the present Beach Avenue running to the present ferry?

A. Yes.

Q. Was 125 feet south of the east end of the McIntyre ditch?

A. I think it was, yes, sir.

[fol. 835] Q. And how far north of the present Beach Avenue was the McIntyre ditch where it crossed Lake Avenue?

A. I think it was south of that.

Q. South of it?

A. I think so.

Q. So that the eastern extremity of the McIntyre ditch was at least 125 feet north of its western extremity?

A. I should say it was, yes, sir.

Q. Now, in crossing that ditch from the south was there any way to cross it except a bridge on Lake Avenue?

A. Yes. There were planks and ties thrown across.

Q. Whereabouts was that?

A. Oh, probably 200 feet west of the river.

Q. And that was when, while McIntyre's cottage stood there?

A. No, that was afterwards.

Q. Afterwards?

A. Yes, sir.

Q. While McIntyre's cottage stood there was there any way of crossing that ditch except on Lake Avenue?

A. I don't know; I don't think there was; I never went down there then.

Q. You never went down there when the McIntyre cottage was standing?

A. No, not that way.

Q. You mean you never crossed the ditch east of Lake Avenue?

A. Yes.

Q. But you did cross the bridge?

A. Yes.

Q. So that people going to the McIntyre cottage had to go along Lake Avenue?

A. Yes; they could go that way or go the other way. There was dry land to go the other.

[fol. 836] Q. How did they cross the ditch?

A. The ditch was only—you could stride over it.

Q. You could jump over it?

A. Yes. Usually, and railroad ties laid across it somewheres.

Q. Now, you spoke of there being water in the McIntyre ditch; did that come from this pool?

A. No; it went into the pool.

Q. And did it ever come from the pool?

A. I shouldn't think so.

Q. You take in time of low water, was the bottom of the McIntyre ditch above the level of the water in the pool?

A. The bottom of the ditch?

Q. Yes.

A. Above the level of the pool, yes

Q. It was?
A. Yes.
Q. And the lake would rise how many feet there from time to time?

Mr. Sutherland: I object to that, your Honor. There is no evidence that the lake rose at that point, and the question is obviously made to put into the mind of the witness something that he hasn't said. He hasn't said there was any lake water in the pool. He has negatived that. Now, the question is unfair to this witness.
Mr. Oviatt: I'm relying upon what I conceive to be a universally accepted principle that water is level, particularly in small areas, and that the rise in the lake would cause a rise in the pool. If I'm wrong in that, why, I apologize, but I think I'm entirely correct.
[fol. 837] Mr. Sutherland: The objection to the question was to the assumption in it that the water in the pool was lake water, which is not the fact. The witness hasn't so said. He has stated the opposite to it. The object of the question is apparent.
Mr. Oviatt: Lake water and river water, I don't care anything about. I'm talking about the level of the water and the level of the water in that river and the level of the water in the pool is affected by the rise in the lake. We have had testimony here that the lake rose five feet. Now, how it can be argued that that would not affect the water in the pool, I can't conceive.
The Master: Ask the witness without suggesting any answer. Ask the witness what he observed as to the rise and fall of the water in the pool.
Mr. Oviatt: I would like to make suggestions to this witness. That's my purpose in cross examination. I am asking questions which are actually very leading. I appreciate that.
The Master: Of course, you have a perfect right to ask leading questions, perhaps, but without assuming that the witness has discussed the rise and fall of the water, you may very properly ask him what he observed about the rise and fall of the water.

Q. Mr. Salmon, you have testified here this afternoon, have you not, that the swamp had water in it when the lake rose, and might be dry when the lake fell?
[fol. 838] A. I didn't mean to infer that the water that was in the swamp went from the lake, though. It came from the other way, from the drainage.
Q. Didn't you tie up the question of the water in the swamp with the rise and fall in the lake?
A. I did not.
Q. You did not?
A. No, sir, I did not.
Q. A rise in the lake level of five feet would cause a rise of five feet in the pool, wouldn't it?
A. I don't think so, as much as that; it would cause some rise, but not five feet.
Q. Then, the water would be up hill and downhill from the pool to the lake, wouldn't it?

A. It is when the lake is blowing up. It goes over the piers.

Q. And how much higher would the lake be at the opening of the piers than down to where this pool was in the the river? How much higher would the water be out a few hundred feet north than it was in the pool?

A. That would depend on the wind blowing.

Q. In other words, the wind would blow it so that there would be higher water at the mouth of the river than it was opposite the pool?

A. No, the opposite way. We get the strongest winds from the northeast, from the northeast, and that would make the water higher in the river than it is in the lake.

Q. So that a rise of five feet in the lake would cause a rise of more than five feet in the pool?

A. I never have said it.

[fol. 839] You said before it might not be so much that way, but now you say it would be higher up at the pool back in the river?

A. No, I don't say so.

Q. The northeast wind blowing would cause the river water to be higher than the lake, you say?

A. Yes, to a certain extent.

Q. And the water in the pool is water which adjoins the river, isn't it?

A. Yes.

Q. So that if the lake rose five feet and there was a northeast wind blowing the water in the pool would be more than five feet above its usual level, wouldn't it?

A. The action of the water there is peculiar——

Q. Well, I'll drop it right there. Did this ditch have on either side banks composed of the dirt that was dug out of the ditch?

A. I think so, in some places.

Q. So that the banks on either side were higher than the surrounding sand?

A. In some places, yes.

Q. How much higher were they than the surrounding sand?

A. Well, the ditch went through knolls in different places. The ditch wasn't all one depth on that account.

Q. How did McIntyre make his pathway from Lake Avenue over to his cottage?

A. Why, the proper way to go was around—with a wagon was to go around on the sandbank, but there was a foot path across.

Q. Across what, the ditch?

A. Yes, that went from the boulevard farther south from where [fol. 840] we turned in with the team.

Q. And that footpath was a footpath distinct and different from this footpath which you say went to the pool?

A. Why, I should think that joined together when it got to McIntyre's.

Q. Now, you have been talking about a log which you say was thrown up on the beach east of the river 250 feet back from the water line?

A. Yes, sir.

Q. So that in that locality waves of substantial size flowed back for 250 feet over the sand beach?

A. Yes.

Q. And in order to carry a log would you it say it took a team to drag away, the waves had to go considerable distant inland beyond the log in order to leave the log there, didn't they?

A. No, I don't think they did.

Q. Well, a mere surface or film of water wouldn't carry that log; you had to have substantial waves, didn't you?

A. Waves and wind with it.

Q. And a wind would blow a log that a team had to draw away?

A. Yes, and water with it.

Q. Water and wind?

A. I don't think the water ever went over the sand bar.

Q. Never went over the sandbar at McIntyre's?

A. No, no. At my cottage.

Q. But in order to carry a log 30 feet long and 2 feet thick you had to have a substantial body to the wave to place it where the log was dropped, didn't you?

A. I suppose so, yes.

[fol. 841] Q. Now, how much farther than the place where the log was deposited would that substantial body of water large enough to carry that log advance upon the land?

A. I don't know how far, I am sure. There was no water there when I saw the log there.

Q. Well, you have been down there so much, and you are testifying to the action down there, can't you tell how much farther inland those waves would go?

A. I don't remember ever seeing water go over the sandbar.

Q. Well, it went back 250 feet at least, to where it left the log, didn't it?

A. Yes. No, the log was laying—it wasn't laying flatways to the lake, it was laying endways. One end was up on my porch and the other pointing toward the lake.

Q. So that it deposited a log right against your porch?

A. Right against the steps, yes.

Q How far have you seen similar storms such as deposited this log drive the waves on the west side of the river where McIntyre was?

A. I never had a great deal of experience over there, Mr. Oviatt.

Q. You never have?

A. No, not much.

Q. You speak of a sandbar on which the McIntyre cottage was erected. Why do you distinguish that by calling it a sandbar from the land south of McIntyre's cottage?

A. Because that was sand and the other was hard soil.

[fol. 842] Q. So that between the sand on which McIntyre's cottage was erected and McIntyre's ditch—wait a minute. You mean the land between McIntyre's cottage and the ditch was hard soil?

A. Between McIntyre's—no, that was sand.

Q. Yes.
A. That is, part of the way it was.
Q. And would you say that all of the land between the ditch and the McIntyre cottage was sandbar?
A. No, not all of it.
Q. What was the rest of it?
A. Hard soil, sort of a red clay.
Q. So that there was red clay on the surface between McIntyre's cottage and the ditch?
A. No, not between McIntyre's cottage and the ditch; between Broadway and McIntyre's cottage and the roadway that went to McIntyre's.
Q. South or north of the roadway that went to McIntyre's cottage?
A. It would be south.
Q. South?
A. South, south and west.
Q. And where with reference to the present Beach Avenue would that be?
A. That would be south, too.
Q. South of the present Beach Avenue?
A. Yes.
Q. You are not confusing the old Beach Avenue with the present Beach Avenue?
A. No, I am not in this case.
Q. This soil that you are talking about now, the hard soil, was south of the present Beach Avenue?
A. Yes.
Q. And why do you call that a sandbar, then, that went from Lake Avenue to McIntyre's cottage?
A. Because it was sand.
[fol. 843] Q. Just because it was sand?
A. Yes.
Q. Was there any depression south of that sand bar and between the sandbar and the hard soil?
A. And depressions?
Q. Yes.
A. No, not at that end there wasn't.
Q. And at the other end?
A. The other end there was.
Q. Any swamp there?
A. Yes.
Q. How large was the swamp?
A. I can't tell you; it was quite a swamp.
Q. Can you give us even the roughest recollection?
A. No, I can't. There was more than one swamp there at that time.
Q. What?
A. There was more than one swamp.
Q. How many swamps were there?
A. Why, two or three small swamps.
Q. And do you know how large they were?

A. No, I don't.

Q. When Judge Sutherland was asking you questions I understood you were talking about walking from the Rome, Watertown and Ogdensburg railroad north on dry land to a pool?

A. Yes.

Q. Now, was the pool that you talked about this McIntyre pool that you spoke of?

A. It was the McIntyre, which was the one I had reference to all the time.

Q. Was it the pool northeast of McIntyre's cottage?

A. Yes.

Q. That you have reference to?

A. Yes.

Q. Well, then, from the pool northeast of McIntyre's cottage back to the railroad on the south did you cross any other swamp or pool?

A. No. You came around and you would get around the swamp.

[fol. 844] Q. There was a swamp there?

A. Oh, yes.

Mr. Oviatt: That's all.

Redirect examination.

By Mr. Sutherland:

Q. Mr. Salmon, I want to show you a map made in 1872 of the village of Charlotte, and see if that will in any way refresh your recollection as to where the McIntyre cottage was located.

Mr. Oviatt: I don't believe this is a proper question.

Mr. Sutherland: Well, let me submit it to his Honor.

Mr. Oviatt: Well, that's what I am about to do.

Mr. Sutherland: I want to show the map of the village of Charlotte in '72, which is in evidence, which purports to show the relative location of the McIntyre cottage with Beach avenue as it then existed, and this McIntyre ditch that we have been talking about. I will hand it to your Honor, and want to ask the witness——

Mr. Oviatt: I want to say a word first.

Mr. Sutherland: Now, I want to hand it to your Honor and see if it is not competent to show this to the witness for the purpose of having his recollection refreshed. Your Honor has observed the fact which we have all observed as to the inaccuracy of what the witness has said as to the location of that McIntyre cottage. It is fair to the witness to let him correct himself if he wishes to.

Mr. Oviatt: No, there is no question of fairness or unfairness in this proposition. We are confronted with this situation in this case. There are certain reputable proofs as to where that cottage [fol. 845] was. That's one thing, that's the proof of where it was. Now we're confronted on both sides with living witnesses who testified to matters very remote in time. Their whole testimony depends upon the accuracy of their recollection; their whole testimony is directed to this, that and the other circumstance and depends for the weight which is to be given, not their credibility, but

the weight to be given *in* from memory, upon the accuracy and tenacity of recollection. Now, this witness, no matter what may subsequently transpire, has shown what his present recollection is. Any witness who takes the stand, refreshed by a document which is presented by counsel as authentic, will immediately say, "Yes, I guess I was mistaken. That McIntyre cottage was some other place." There is no purpose in it, there is no refreshment of recollection. It doesn't take a map, a question refreshes recollection. This is, under the guise of refreshing his recollection. A mere injection into the mind of the witness of an authentic fact upon which he can rely, and while the form is refreshing his recollection, its substance should be regarded. We have a witness here who shows that his recollection is not accurate. Now, Mr. Salmon and I are old friends, I have the utmost respect for him, but he's a witness here whose recollection is important on these issues, and I say that it is absolutely wrong and improper that the witness should now be permitted to say, yes, he recalls something different [fol. 846] than his solemn judgment and recollection was a moment ago, merely because there is presented to him an absolutely authentic document. I think that the procedure is wrong in principle, I think that it is illogical. It does not change his recollection at all. In a thousand ways I was showing that this witness' recollection was wrong at the time your Honor took a hand. Not for the purpose of discrediting the witness, or anything of the kind, I was showing this witness' testimony as to the location and relative position of these things was worthless.

The Master: Well, does it become any more valuable if it is corrected by looking at a map? Is the testimony of the witness any more credible after he has looked at a map and says, "I'm mistaken?"

Mr. Oviatt: I will let Judge Sutherland answer the question. That's his purpose, and if the judge will be honest he will say, "Yes." If he says, "No," and it will go on the record, show him all the maps, I don't care; but if Judge Sutherland will say that his testimony is no more credible after looking at the maps, I am satisfied; if the judge says that his testimony is, then my objection is good.

The Master: We can't settle a question of the admissibility of evidence on any such test as that. I am inclined to think, Judge Sutherland, that the objection is good.

[fol. 847] Mr. Sutherland: Very well, I won't press it. I will then take another tack. The witness will be withdrawn from the stand, and then, of course, there is no objection to his looking at a map when he is not on the witness stand, and if he asks afterwards to correct his testimony because he sees he was mistaken, I take it, your Honor would let him correct his testimony. Now, that's what is done. I am merely trying to save a little time and not leave a thing which will confuse the record. I am willing to admit, as is perfectly apparent, that Mr. Salmon is incorrect in his recollection as to where the McIntyre cottage stood. That's obvious to anybody here. Now, is the record to be confused, irrespective of

the value of the witness' testimony? Is the record to have in it a confusing thing as to where the McIntyre cottage stood?

[fol. 848] The Master: I don't think it would confuse anybody in the world.

Mr. Sutherland: I hope not, I hope not.

Mr. Moser: It seems to me that the whole difficulty arises from the fact that they are asking Mr. Salmon about where something stood with reference to something that wasn't there at the time. Now, there wasn't any Beach avenue there, there wasn't any new Beach avenue there fifty years ago, at the time that he is talking about, and what he is trying to do is to locate where, with reference to the things that were there at that time, the present Beach avenue has been erected. Now, that is not a question of recollection; that's a question of estimation.

Mr. Oviatt: If your Honor please, I'm very wicked——

Mr. Moser: I think he has got it pretty nearly to the fact.

Mr. Oviatt: If your Honor will show me the usual courtesy, I would like to make this little additional statement. I am not basing anything, so far as the facts are concerned, as to where the McIntyre cottage is, upon this gentleman's tes*t*imony. I am adopting a well recognized and much used course of being able to contend at some future time in this case that where a person does not recollect with reference to that which stands out as clearly as the McIntyre's cottage, that his recollection on the other subjects with [fol. 849] reference to which he may have testified, is subject to the same imputation and doubt.

The Master: You are quite within your rights; no doubt about it.

Mr. Oviatt: I am not going to ask this Court, as counsel on the other side seems to think, that the McIntyre cottage was south of Beach avenue. Don't get that idea.

The Master: Quite right.

Mr. Sutherland: That's all. Mr. Salmon, for the present, if you will kindly remain a little while.

Lawrence Sexton was thereupon called as a witness for the defendants and, being duly sworn, testified as follows:

Direct examination.

By Mr. Sutherland:

Q. Where do you live, Mr. Sexton?
A. I live on Broadway, in the northern part of Rochester.
Q. In the Twenty-third Ward?
A. In the Twenty-third Ward.
Q. What we have always called Charlotte?
A. Yes, sir.
Q. And how long have you lived there?
A. Sixty-five years.

Q. Born there, then, I take it?
A. I was.
Q. What has been your occupation in your manhood life?
A. It varies. I have been a laboring man.
Q. We have all been that.
A. I have been bartender, and I have been a candy maker, concessionaire, and I don't know what else.
Q. Have you held any public office in the village of Charlotte?
A. I was police judge of the village of Charlotte, justice of the [fol. 850] peace of the town of Greece for a long time.
Q. For about how long, Judge?
A. I guess I was twelve years as police judge; fourteen years as police justice.
Q. On the town board of the town of Greece?
A. I was.
Q. In your youth did you ever visit the McIntyre cottage?
A. I have.
Q. How did you get to it, Mr. Sexton?
A. Down what is now Lake avenue.
Q. And where would you turn from Lake avenue to get to the McIntyre cottage?
A. Well, there was a street running from Lake avenue over to the McIntyre cottage, one side of it.
Q. What was that called in the early days?
A. I don't recollect anything any more than—I don't know as I ever recollect of the name being assigned to it.
Q. When did that street come to be called Beach avenue, the old one, I mean?
A. Well, that I can't say; I don't know when.
Q. When was it given up as a street, and the new present Beach avenue substituted for it?
A. Well, I remember at the time, but I can't tell the exact date, some time during——
Q. Well, it was after Craig and Upton took the lease from the New York Central and they built the buildings down there and made a park, wasn't it?
A. It was about that time, yes.
Q. The old roadway leading from Lake avenue out to McIntyre's, and afterwards to the Spencer House, was discontinued?
A. Yes.
Q. And new Beach avenue was built?
A. Yes.
[fol. 851] Q. And opened?
A. Yes, sir.
Q. Now, in the old days, when Mart McIntyre's cottage was there, how did you get to it from Lake avenue?
A. Through that street.
Q. Was there any waterway, or anything of that sort, that you crossed in going from Lake avenue to McIntyre's?
A. No, sir.

Q. What was the nature of the soil over which you drove or walked?

A. Sandy.

Q. Lake sand?

A. Yes, sir.

Q. What did McIntyre's cottage stand on, if anything? Was there anything under it in the way of piling?

A. Just common posts.

Q. Posts driven in?

A. Well, I don't know whether they were driven in or dug in.

Q. And they stood vertically, did they?

A. Yes, sir.

Q. And were stills laid from post to post?

A. Well——

Q. Or were sills resting on the sand, which was it?

A. I was under the rear end of it. I was never under the front end of it so I will answer for the rear end of it.

Q. Yes.

A. It was ordinary beam sills, resting on the posts.

Q. Resting on the posts?

A. Under the rear end.

Q. Was there any kind of a cellar under there?

A. There was kind of a cellar they used for kind of a store and cellar in the rear end of it; I don't know about the front end.

Q. Was there anything in the nature of a porch on the south end of McIntyre's cottage?

A. No, sir.

[fol. 852] Q. You told me something about selling bait down there.

A. Yes, sir.

Q. Tell the Court what there was of that.

A. Well, I used to dig fish worms. McIntyre had fishing tackle and boats, and he used to buy angle worms to sell out to the customers, and I, a little fellow, used to like to make some money, and I would dig them and bring them down and sell them to him.

Q. And where would you put them, with reference to McIntyre's cottage?

A. Over in the southeast corner. There was an opening there where they kept their bait in there and business, and I used to deliver them generally there. A fellow by the name of Alex McDowell had charge of them.

Q. Was there, then, a space between the floor of the McIntyre cottage on that corner, and the sand?

A. Any floor?

Q. A space between the sand under the cottage and the floor of the cottage where you struck your bait pails and they kept their poles?

A. Well, there was just an opening in there.

Q. Well, what did it open into, Mr. Sexton?

A. Nothing that I know of, just an opening in there that we put the bait in. I never was through it only just beyond the entrance.

Q. When you got your bait box set down in the opening, what was over it? Was the house over it?

A. The building, yes.

Q. Well, that is what I mean; there was a space then under that corner of the building?

A. Yes.

[fol. 853] Q. Where you could put your bait boxes and he kept some fish poles under there, did he?

A. Yes, he kept them there, stuck up against the side. I don't know what there was in under there.

Q. Now, what was the soil under that corner of the house, what was the nature of it?

A. Well, it was sandy.

Q. What was the nature of the soil around the McIntyre cottage?

A. It was sandy.

Q. What was the nature of the soil from the McIntyre cottage west to Lake Avenue?

A. It was sandy.

Q. How far north of the McIntyre cottage was the edge of the lake when you were a boy sixty-five years ago, or sixty years ago?

A. Well, I should say it varied from two hundred to three hundred feet.

Q. What was the soil, sandy or otherwise?

A. Sand.

Q. Sand? Any filling in there of any foreign substance?

A. None.

Q. Of any sort?

A. No, not a thing.

Q. Now, Mr. Sexton, I want you to locate for the Court here, to have your own recollection where that pool was that we have been talking about, with reference, now, to McIntyre's cottage.

A. Well, now, McIntyre's cottage sat west of the pier.

Q. Yes.

A. And this pool would be south of McIntyre's cottage and east, of course. It would be practically southeast because the pool was up against the dock, up against the pier.

Q. How big was that pool, Mr. Sexton?

A. I should say the pool was approximately fifty feet from the [fol. 854] pier to the back edge of it, and it varied anywheres from two hundred feet to more, up.

Q. Running south?

A. I should say two hundred feet, running south, where you could row boats or stack boats.

Q. Now, how big was the opening into that pool through the pier?

A. Well, it is a good while ago. I have rowed a boat in and out there but I should say approximately, to my best judgment, it was from fourteen—fourteen feet.

Q. Do you know how that opening happened to be made?

A. Why, I don't know, but I should say it was made there with the intent of having an opening to get into that.

Q. Into that pool?

A. Into that pool. It was a boat harbor.

Q. What was the nature of the filling under the pier adjacent to the opening?

A. It was stone.

Q. North and south? Stone?

A. It was stone.

Q. How deep was that pool in its deepest place?

A. Well, that would be near the river, of course. I can't say. Of course right at the entrance it would be quite deep.

Q. Yes.

A. I would not want to say.

Q. Now, what do we mean, now, by "quite deep?" The Court will want to know what you intend by that expression, "quite deep."

A. Well, I fished there a good many times, and I don't know as I would want to say just the depth of it. It might be twelve feet deep.

Q. Just when you got——

A. Roughly, I want to say, roughly, would be twelve feet deep, and, then, of course, as you got into that harbor and boat landing, [fol. 855] why, of course, it would be shallower.

Q. Yes.

A. Now, that's my recollection now; I can't say.

Q. All right, Judge, that's satisfactory to me. How about the depth of that pool continued from the pier westward to its westward end?

A. How about what?

Q. How would the depth of the pool be as you went now toward the west end of it?

A. Why, it was a gradual slant until it came to a little beach there at the end.

Q. Got shallower as you went to the west?

A. Yes.

Q. What sized boats, now, were taken into that pool?

A. Well, originally when McIntyre was there there was nothing but row boats, my recollection is. Later on, when a man by the name of Frank Dodd took charge of it, that is, after the Spencer House time, why there were larger boats, sail boats; that is, they weren't great big boats but they probably were eighteen, twenty-foot boats, to my best recollection, had spars on them, sail boats.

Q. Now, did he do any excavating in that pool?

A. Not to my recollection.

Q. How long did that opening remain in the pier?

A. Well, it was a good long while.

Q. It stayed there during the whole time that the Spencer House was there, did it?

A. Well, I should say it did, notwithstanding that I can't just recollect the time that it was closed up. It was there for a good while.

[fol. 856] Q. You remember the fact that it was closed up at one time?

A. I do.

Q. The entire opening in the pier was closed by the government?

A. Well, first there was an opening there, and then, later on, when Dodd took charge of it he put a little bridge over it, a running bridge.

Q. Now, that bridge was over the top of the opening through the pier, was it?

A. Yes, sir.

Q. And under the bridge was a space through which you could get a row boat?

A That is what we speak about.

Q. So that anybody could walk from a point south of there, along the pier?

A On the pier.

Q. On the pier, across the bridge over the opening into the pool, and keep right on going out to the lighthouse?

A. They could.

Q. Before that bridge was there that opening prevented anybody walking continuously on the pier, of course.

A. It did.

Q. Did any lake water feed that pool?

A. The pool was adjoining the river.

Q. Where did the water come from that got into that pool?

A. Well, it came from a creek, and it came from the river.

Q. Very good. Well, now, what creek fed that pool in part?

A. Well, the creek that runs from this pool up west, as I'd say. It may not be exactly a direct line of west, but I always said it was west, running up, crossing the boulevard, and then turning in a [fol. 857] southerly direction and running up in through and joining on to another creek, where one of them had its source on the Fry property, or on the Cottrell property, and the other had its source from farther on to the south, which I don't know where.

Q. Now, Judge, we are going up stream, as you have described that.

A. Yes.

Q. The water ran from those sources, south?

A. And down.

Q. And then turned to the eastward?

Mr. Moser: You mean it ran north.

Q. Ran north?

A. Yes, ran north.

Q. Ran north, and then turned to the eastward and across Lake avenue.

A. Yes, sir.

Q. And eventually got into this pool.

A. It did.

Q. Did you yourself see any ditching done there by McIntyre?

A. I never did.

Q. When you first saw this, to your recollection, what was the fact about trees growing there?

A. About what?

Q. Trees growing on either side of this ditch.

A. Well, there was willow trees growing all around there.

Q. How big were they when you first remember them?

A. Oh, I don't know; they wasn't so big, but I can't just say. There was trees, willow trees was there.

Q. Did you see McIntyre plant any trees yourself?

A. No, I never did.

Q. Do you remember when McIntyre sold out to Burns?

A. I remembered at the time, yes, hearing about it.

Q. Judge Sexton, was that land where the McIntyre cottage stood, [fol. 858] and where the Spencer House stood ever overflowed by lake water in your time?

A. No, sir.

Q. You have lived there all this time, have you?

A. Yes, sir. Well, I was here in Rochester for a while, employed here.

Q. You were back and forth to the lake, weren't you?

A. Yes. A short time I was here.

Q. Where did McIntyre pasture his cow, do you remember?

A. Why, he pastured two cows to the south side of the creek, which would be part of what now is Beach avenue.

Q. Yes, sir. How far was it, as you recollect, from the south side of McIntyre's cottage until you got to the ditch?

A. Oh, let me see. My best judgment, I would say four hundred feet.

Q. What was the nature of the soil between the ditch and the south end of McIntyre's cottage?

A. Give me that question again, please.

Q. The soil, what was it, sand or——

A. From McIntyre's cottage?

Q. From McIntyre's cottage back to the ditch, what was the nature of the soil?

A. You mean west of this pool, as you call it?

Q. Yes, west of the pool.

A. Well, it had a mucky, sandy tendency.

Q. Now, south of the ditch, what was the nature of the soil?

A. Well, part of it was hard clay, and part of it was a mucky substance.

Q. How far back of where the ditch was was it until you came to something which you might call swamp? How far south would you [fol. 859] go from the McIntyre ditch before you came to anything that you would call swamp?

A. Well, there was a marsh that was back of the furnace, and pointed to a point, and it came in on the McIntyre property a short distance, which I can't just say, maybe a hundred feet or thereabouts, seventy-five or a hundred feet, because it projected over onto the McIntyre property.

Q. Where do you now intend us to understand that the south boundary of the McIntyre property was, as related to the present location of Beach avenue?

A Approximately two hundred and fifty feet.
Q. South of the present location of Beach avenue?
A. Yes, sir.
Q. Is what you say was the south line of what you call the McIntyre property?
A. I should say approximately two hundred and fifty feet.
Q. Now, do you say two hundred and fifty feet south of the south line?
A. Yes.
Q. Of present Beach avenue?
A. Yes.
Q Now, the tip end of this so-called swamp entered into part of that area, did it?
A. Yes, sir.
Q. And that you say was two hundred and fifty feet, extended two hundred and fifty feet south of the present south line of Beach avenue?
A. Yes, sir.
Q. At what point, as regards Lake avenue, was the tip of that swamp? Was it nearer Lake avenue than the river?
A. Probably half way. It might have been a little bit nearer [fol. 860] the boulevard than the river, but I'd say close to half way.
Q. Now, Judge, what is your observation as to whether during the years that you have lived there from your boyhood to the present time, the shore line of the lake has progressed? What is your observation as to the progress made by the shore line during these years?
A. More beach, you mean?
Q. What?
A. More beach?
Q. Yes, as to whether the shore line has gone further to the north during these years or not.
A. Well, at the present time I guess it is as far or farther north than I ever saw it before.
Q. Was there any water connection between the swamp, the tip end of which you say went into this two hundred and fifty foot area south of Beach avenue, and Lake Ontario, other than through the river? Do you understand the question?
A. Yes, I understand the question. There was no area of water. Is that what the question is?
Q. Was there any water connection?
A. No, sir.
Q. Any channel?
A. No, sir.
Q. Or creek?
A. No, sir.
Q. Or anything running from this swamp?
A. No, sir.
Q. Out into Lake Ontario?
A. No, sir.

Q. If you wanted to get from the swamp to the lake, how would you have to go by boat?

A. By boat?

Q. Yes.

A. Well, you would have to go around by the river.

Q. How much of the time, during the year, was there any water [fol. 861] running through the water course that you described west of the boulevard, that flows north, and then, in your day, flowed east in this McIntyre ditch into the pool?

A. On any and what time does the water run in there?

Q. Yes.

A. Well, I should say that it is a continuous stream.

Q. You think there is water there all the summer long?

A. Yes.

Q. Running through that stream?

A. Yes, there is.

Q. That is not fed from Lake Ontario, is it?

A. No, sir.

Q. It is a stream of water that has its origin back in the higher lands?

Mr. Oviatt: Do you realize, Judge, that you are getting "Yes, sir," and, "No, sir," which imply that you are putting questions in absolutely a leading form?

Q. How far south of Beach avenue is the source of that stream?

A. I don't know as I just understand that question, Judge.

Q. If you trace that stream southward, how far will you go before you get to the beginning of the stream?

A. If you trace it southward?

Q. Yes. The stream flows north, doesn't it, on the west side of the boulevard?

A. Yes.

Q. For how long a distance is there any stream there?

A. Well, for better than two miles, to my knowledge.

Q. Yes.

A. More than that. There are two streams, one of them joining into the other.

Q. Where do they come together?

A. I think on the Allen tract.

Q. Which side of the Latta Road is that, south?

A. South side.

[fol. 862] Q. So that you would call it a living stream, would you?

A. Yes, sir.

Q. Are there any springs up to the source of it, that you know of?

A. One of them that I know of; the other one I don't know of.

Q. How much of a water shed is there leading into that water way which would catch surface water, rain water and so on?

A. What do you mean?

Q. Oh, I want to know whether there is any considerable area—?

A. No.

Q. From which the surface water would naturally run into this stream. Is there very much of an area?

A. Why, the fountain of the stream, do you mean?

Q. Yes. I mean how much surface would drain into this stream, Judge, from its source down into its mouth? How much drainage would it carry to the right and left of the stream?

A. Well, I don't know. It varies. It varies anywheres from fifty to more feet, forty or fifty feet.

Q. That is the slope on each side?

A. Yes, sir.

Q. Running down through the stream?

A. Yes. It runs through a little marsh right back of my place, probably two hundred feet wide.

Q. Where is your place?

A. That's right up south of the Rome, Watertown.

Q. And how far back of Lake avenue to the west is that marsh [fol. 863] that you speak of?

A. Why, it is seven hundred feet, approximately.

Q. This stream runs into that marsh, does it?

A. Runs through that marsh.

Q. And then runs out of it?

A. And then runs out of it down south; runs on further up to the south again.

Q. Were you on the village board when old Beach avenue was discontinued and new Beach avenue laid out?

A. No, I wasn't.

Mr. Sutherland: I think you may cross-examine.

Cross-examination.

By Mr. Oviatt:

Q. I have forgotten, Judge, what you said about the manner in which the pool was opened up into the river. What did you say on that subject?

A. Why, I said that there was an opening in the pier of approximately fourteen feet, that's my best recollection now, that let in the water. Of course, it was a boat harbor there for McIntyre, and later on for the man, Dodd. They kept their boats in there.

Q. How did the opening in the pier——

Mr. Sutherland: Mr. Oviatt, there was one thing I omitted. Suppose I supply that now and then I won't bother you.

By Mr. Sutherland:

Q. You worked at the Spencer House, didn't you?

A. Yes, I did.

Q. How old were you then?

[fol. 864] A. I think I was probably seventeen years old. I say, at the Spencer House. At that time I worked in the bathing houses. It was later on, in 1880, I worked at the Spencer House, but two

years previous I worked at the bathing houses which was connected with the Spencer House and rented to a man by the name of Smith.

Q. Now, who ran the Spencer House then?

A. I think Captain Burns ran it at that time.

Q. And he leased the bathing houses?

A. To Mr. Smith.

Q. And you worked for Mr. Smith a while?

A. Yes.

Q. Where were the bathing houses located?

A. They were down on the lake front, approximately—well, they were on a northwesterly line from the Spencer House.

Q. And which side of Lake avenue?

A. Why, they were on the east side of Lake avenue.

Q. How far from Lake avenue?

A. Well, they were nearer to the pier than they were to Lake avenue, two-thirds of the way from Lake avenue to the pier, I should say.

Q. How many boat houses were there there?

A. Bath houses?

Q. Bath houses.

A. I think there was nine.

Q. You ran those bathing houses, did you?

A. I was employed to run them, yes.

Q. How were they built?

A. Little shacks, along side of the other.

Q. What did they rest on?

A. Posts.

Q. Driven into the sand?

A. Yes, sir.

Q. Front of them out in the water, were they?

A. No.

[fol. 865] Q. On the sand?

A. On the sand.

Q. From those boat houses up to the Spencer House, what was the nature of the soil?

A. All sandy.

Q. All sandy? All lake sand?

A. Yes.

Q. After you finished your service at the bath houses you were employed in the Spencer House itself, were you?

A. Yes, sir.

Q. What did you do there?

A. I tended bar.

Q. What year was that?

A. Why that was in '80, I think; I am pretty sure it was in '80. I worked there in 1880 the first time.

Q. How long were you employed there?

A. Well, I have tended bar there two seasons; that's all the time it stood there.

Q. Were you working there when it burned?

A. I had charge of it then. I was employed—I won't say I had

charge of it that winter either. I think I will take that back. I had charge of it two other winters, but I don't think I was in charge of it that winter.

The Master: Well, you were there when it burned?

Witness: I remember the night, Judge. I was standing up for a brother-in-law in Medina the night that it burned, on the 12th day of January, 1882.

Q. Well, now, we got another date for it.

A. I got a telegram here that I got from my brother-in-law. I thought I would bring it along. That's dated the 11th, to come up there, and so I thought I would bring it along; and I have got a letter from the woman I afterwards married, my wife, that she wrote, and it is dated January 12th, congratulating her sister on [fol. 866] her anniversary. There is the telegram I got, calling me there. I think it is pretty correct, and I said to the man that was down there before I got this information, that it was January the 12th.

The Master: That the Spencer House burned down?

Witness: Yes, sir.

The Master: You think the newspaper here in town was mistaken? It says it was burned down on January 19th, 1882.

Witness: I don't know. I can't get away from it. There is the telegram calling me there. You see it is dated January 12th, 1882.

Q. Well, Judge, you might have had a good time and stayed a week or two.

A. That's my recollection of it, any way.

Q. I want to ask you about the Spencer House itself, its construction. First of all, was there a cellar under it?

A. Well, there was a cellar.

Q. How much of a cellar?

A. Not very high.

Q. Had it any flooring the cellar itself?

A. The cellar? No.

Q. Sand?

A. Sand.

Q. How many stories was the Spencer House above the ground?

A. Three stories.

Q. Porches all around it?

A. On three sides of it.

Q. Which sides?

A. North, east and west.

Q. North, east and west?

A. Yes.

Q. No porch on the south side?

A. No.

Q. How many rooms did the Spencer House have, would you say?

[fol. 867] A. Gosh, I know but I have forgot. I can't say.

Q. Describe the halls running through it on the ground floor.

A. Well, there were two wide halls running pretty much to the

center; one running east and west from the entrance on what you call Beach avenue over through on towards the river.

Q. Yes.

A. And then there was one running north and south, from the front towards the lake, runnng back toward the rear end of the building.

Q. Yes. Now, Judge, you remember, I assume, pretty distinctly where the roadway was located along which people drove from Lake avenue to the Spencer House, don't you?

A. I do.

Q. Where did that road end?

A. Ended in front of the west side of Beach avenue, and part of it; the other part ended at the river, going on to the ferry. It branched.

Q. The Spencer House front was toward Lake avenue wasn't it?

A. Yes; I should say that's what you would call it.

Q. That's where the people generally went in, any way?

A. Yes, sir.

Q. Did I understand you to say that what we have been calling old Beach avenue, that's the driveway leading up to the Spencer house, ended in a fork or split, one side going south of the Spencer House out to the ferry, and the other going on the north side of the Spencer House for a distance?

A. No. It went right up to the front of the Spencer House and made a turn.

Q. Very good. A little balloon road, was it, around there?

[fol. 868] A. A balloon road.

Q. Swung around?

A. Yes.

Q. And how big a loop was that?

A. Oh, it was a pretty good sized loop; I should say it was an egg shaped loop, sixty feet by maybe fifty by thirty, thereabouts, maybe better; it might have been a little better.

Q. Now, how far did the road lead which went south of the Spencer House to the ferry?

A. How far did it lead?

Q. Yes. How far was it to the ferry from the corner of the Spencer House? The southwest corner of the Spencer House was how far from the ferry?

A. The southwest corner, I should say, was——

Q. The southwest corner, not the southeast corner.

A. Yes. I should say it was a hundred and forty feet, approximately.

Q. Where was the ferry with reference to the pool that you described?

A. Just to the north of the pool, just north. The road run north of the pool.

Q. Did the pool continue through the entire life of the Spencer House?

A. Oh, yes, yes.

Q. It wasn't closed up until after the Spencer House burned down?

A. No.

Q. The ferry was which way from the pool?

A. It was north of the pool.

Q. And this road that ran south of the Spencer House led to the ferry?

A. Yes, sir.

[fol. 869] Q. What was the nature of that road between the Spencer House and the ferry? What was it on, sand or other kind of stuff?

A. Why, it was sand.

Q. What was the nature of the soil surrounding the Spencer House?

A. Sand.

Q. Any artificial fill there?

A. Not of any quantity. They had a boiler there and they may have throwed some of the ashes around, but it was generally sand around there.

Q. Will you reach right back of you, Judge, and take that big picture down (referring to the exhibits)? Take them all and look at them. I want you to look at a picture of the Spencer House that's in there. I show the witness Defendants' Exhibits 19 and 20, do you recognize those pictures?

A. Yes, I do that one.

Q. They have been identified here as the Spencer House; do you recognize it?

A. I recognize this one here.

Q. You are speaking now of what is the number up in the corner there,—19?

A. 20.

Q. 20?

A. Yes.

Q. Well, have you got any doubt about 19 being a picture of the Spencer House?

A. No. That looks to me like the river side; that is the east side.

Q. Which one are you speaking of?

A. This one.

Q. Well, tell us the number, the exhibit number on the corner, away up in front on the right.

A. 19. That looks to me like the river front side, that would be the east side; and this looks to me like the lake side, towards the lake.

[fol. 870] Q. Well, the left hand corner, now, of Exhibit Number 20, shows a part of the pier, doesn't it?

A. No, I don't know whether it does or not.

Q. Well, what is that you got your thumb on there?

A. Here (Witness refers to exhibit)?

Q. Yes. What is that, part of the pier?

A. Over here, yes; this here.

Q. Very well. Now, is that portion of the pier south of the Spencer House or north of it, toward the lake? Or can't you tell

from the lake out there whether that piece of the pier is between the Spencer House and the lake, or south of the Spencer house?

A. There wasn't any pier between the Spencer House and the lake.

Q. Well, now, not directly between it. You were making a calculation as to the direction from which that picture was taken, which is marked Defendants' Exhibit 20; now you said you thought that was the Spencer House in Exhibit 20, looking toward the lake.

A. Yes.

Q. Are you correct about that?

A. Well I should say that that was the front that was looking towards the lake.

Q. Well, I don't want to dispute it at all; I have no intention of disputing it.

A. That's my way of looking at it; I am not much of an architect on these pictures.

Q. Now, I ask you whether in the left hand lower corner of Exhibit 20 you see any wood work, any wood construction.

A. Well I don't know.

[fol. 871] Q. Now, do you recognize that lower left hand corner of that picture as a part of the pier on the west side of the river?

A. Well, no, I am not much of a reader of those pictures.

Q. Very well. You don't want to give a guess on that?

A. I can't give a guess on that at all. I can give my description without any maps, I can do that.

Q. Which side of the Spencer House are we looking at in Defendants' Exhibit Number 19?

A. That looks like the front of the hotel.

Q. That would be facing——

A. The boulevard.

Q. Lake avenue?

A. Lake avenue.

Q. All right. We will let it go at that.

A. That's what it looks like to me. As I say, I am not much posted on that business at all.

Q. Well, that agrees with our estimation.

A. That looks like it to me because that looks like a fence. That is the guard rail that run around the street to run around with. That is what it looks like to me.

Q. Do you see any road in that picture, Exhibit 19?

A. Only what is around that guard rail there.

Q. You do see a driveway there, do you, a road?

A. Yes.

Q. This side of the guard rail?

A. Yes, sir.

Q. In front of the guard rail?

A. Looks like it. I don't like that picture for me to decide it.

By Mr. Oviatt:

Q. What did you say, Judge?

A. I don't like that picture for me to decide it because that balloon

[fol. 872] or egg shaped turn came right out straight in front of the hotel, to my recollection.

Q. This picture does not show the condition as you recollect it?

A. Yes, it does, but you see there is what I have reference to. You see there it runs to a sharp point, or rather egg shaped, and goes around here. Now, that road, they came into the right hand side of that egg shaped place, turned right around here, the front of the hotel, and came right back here on the same street again. It was a balloon, but it does not show it, in my particular observation, only this part of a road here. But this road, you see, probably this is what is meant by being here, and then it went around over here, and around over that balloon, and back again around this turn, and that went over to the picture.

Q. There is a loop there that is not shown in the picture?

A. Not very well. I don't think it is shown very well to me. I am not much of a man to dig anything from pictures.

Q. We were talking about the pool, Judge, and you had started to say something about the opening in the pier. Do you know how that opening came to exist there?

A. No, I don't.

Q. Have you any recollection on the subject at all?

A. No, I don't.

Q. And you know how the pool came to be formed?

A. No, I don't.

Q. You don't know what caused that pool to be made?

A. No, I don't. When I first went there the pool was there. I rowed boats in and out of that place.

Q. When the water was lowest in the lake did this stream flow [fol. 873] right through the McIntyre ditch and join the pool without any falls or anything of that kind into the pool?

A. Oh, no. When the water was low in this pond, why, the creek was above it. There was some old stone thrown around there that was taken from the pier, and I remember those stones being back in there by the mouth of this creek.

Q. Do you know who put the stones there?

A. No, I don't.

Q. What kind of stones were there?

A. Flat stones, probably taken out of the pier, what used to be filling on the pier.

Q. And do you remember water in the pool being at any time level with the water in the creek?

A. Oh, no.

Q. You don't remember that?

A. Oh, no. I went up and down it a good many times.

Q. Well, I mean at the mouth of the creek, Judge.

A. No, no.

Q. That is, the creek was at all times, at the mouth, above the level of the pool?

A. As far as my recollection is, yes.

Q. Little falls there, was there?

A. Yes, slight.

Q. How high was the falls at the mouth of the creek?
A. Oh, I couldn't say. I roughly say maybe two feet or thereabouts. Of course, it graded off a distance; I wouldn't say.
Q. So that the water in the ditch came to the pool and then there was a little water fall a couple of feet high?
A. Maybe two or three feet.
Q. Two or three feet?
A. Yes, a distance.
Q. And was that water fall in existence there all the time?
A. As far as my memory goes, yes.

[fol. 874] Mr. Beach: I understood him to say, "in a distance."

Q. Now, then, with Mr. Beach coming to your rescue,—You don't need it, do you? You don't need any help from Mr. Beach?
A. Not to tell the truth, I don't.
Q. Now, then, was this water fall two or three feet long, or two or three feet high?
A. How do you mean?
Q. The water fall at the mouth of the creek.
A. High.
Q. High?
A. Yes. It was on a grade; it wasn't a short fall.
Q. No, but the grade where it started to fall was two feet or three feet above the level of the pool?
A. Oh, I am just giving you my best judgment on it, that's all.
Q. But that's what you meant?
A. That's what I mean; three feet, approximately, of a fall from the creek down to the level of this pond, going on a grade.
Q. Going on a grade. And how long was that grade?
A. Oh, I don't know; it wasn't very long.
Q. Two or three feet?
A. Oh, yes, more than that.
Q. Four or five feet?
A. Twelve feet, fifteen feet, maybe.
Q. Fifteen feet?
A. Maybe.
Q. So that fifteen feet west of the pool the creek began to fall, and fell two or three feet from that point to where it got to the pool, and that fall was over these flat stones that had been taken in there?
A. Partly, yes; stones all around it.
Q. And how much water would there be flowing in that creek and over those falls at different periods of the year?
A. In the spring there was considerable, the creek was pretty well [fol. 875] filled. During the summer there was a smaller amount.
Q. Would the water in the creek during the spring when the water was largest in quantity, be a foot or more deep, or less than that?
A. Yes, sir.
[fol. 876] Q. Two feet deep?
A. Well I wouldn't say, it was pretty well filled up.
Q. How deep would the water be in the Summer time, when it was lowest, in the creek?

A. Not very deep. Of course at the lowest it was probably about an average thing, four to six inches.

Q. That would be when it was the lowest?

A. Just a stream of water running down through.

Q. You have described the land south of McIntyre's cottage as beng mucky and swampy. Will you tell us a little more about the character of the muck there and the color of it?

A. Well it was dark, apparently, from moss and leaves and a mixture of sand in there, so that when it was wet, it was not sand, it was mud.

Q. Where did the wet come from, that made it mud?

A. Well it might be from a rain.

Q. Where else might it be from?

A. I don't know.

Q. Were you in the court room where Mr. Gray was testifying?

A. No sir.

Q. Do you remember any little areas, south of McIntyre's cottage, which formed pools of water or wet damp places from the lake water percolating through the sand?

A. No sir, never.

Q. At the time when you saw this muck south of McIntyre's cottage, was there anything growing in it?

A. Nothing, only there was trees. In my recollection, there was some small willow shrubs on the bank of the stream.

[fol. 877] Q. Which bank, both or one?

A. Both, I think.

Q. Were there trees on both banks of the creek?

A. Well, you mean Willow trees?

Q. Yes?

A. I can't just say as to whether they were on the south side, but I know they were on the north side.

Q. Could you distinguish when you first saw that creek, that it had been dug artificially and the bank thrown up on either side with the material taken out of it?

A. I should say it had not, from my recollection. I wouldn't say that it had not, but I don't think it had from my recollection.

Q. There was nothing there to indicate that it had been excavated?

A. Not that I can recall.

Q. Were the banks on the side of the creek any higher, or were they level with the surrounding territory?

A. I should say they were level.

Q. No higher?

A. That is my recollection of it.

Q. You used the expression about something being projected from the swamp?

A. No, I said the swamp projected from the south line of the McIntyre property, that is what I said.

Q. In your testimony you said something about the fact that the beach had grown wider, did you use any expression of that kind?

A. I didn't say that. I said that the beach was wider now than it had been in my recollection. There was more beach front there.

Q. When you spoke of the beach being wider now than at any time in your recollection, what did you refer to as the beach?

A. That is what I mean, that it had made more beach.

[fol. 878] Q. Do you say there was a cellar under the Spencer House?

A. Yes sir.

Q. Was the floor of the cellar, the top of the beach, or do you mean that there was any excavation into the sands of the beach?

A. I think there was a slight excavation.

Q. Were there any walls there?

A. Yes, that is my recollection.

Q. Did the Spencer House stand upon stone masonry?

A. Yes, I think it did.

Q. And that stone masonry extended all around under the sills of the Spencer House?

A. I could not say.

Q. What portion of the Spencer House stood upon stone walls as you recall?

A. I think it all did. I couldn't say whether it was a solid stone wall or abutments all around.

Q. Would you say that it did not stand upon piles or timbers standing erect like posts?

A. That is my recollection. It was a stone wall, or stone pillars. It was not posts. I have been in the cellar a good many times.

Q. Do you recall any bridge of any kind on old Beach avenue from Lake avenue over to the McIntyre cottage or the Spencer House?

A. Nothing in my time.

Q. How far back does your recollection of the McIntyre cottage go in years?

A. I think I can remember when I was seven years old, eight years old at least.

Q. And you were seven years old about 1865?

A. Yes.

Q. And at that time you remember there was no bridge on old Beach avenue from Lake Avenue to the McIntyre cottage?

[fol. 879] A. Yes.

Q. And you have no recollection of any swampy place just east of Lake Avenue around where the road to McIntyre's cottage went?

A. A swampy place east of Lake Avenue? No, the road was always fairly presentable. I never saw any body of water there.

Q. What other condition do you say you saw aside from the body of water?

A. I never saw it in any way.

Q. Was there any sidewalk constructed from Lake Avenue over to the Spencer House?

A. In later years there was a wooden one.

Q. Do you remember when that was put in?

A. No I do not remember when it was put in. It was put in a good while ago. It was there in the Spencer House time. I know that it was pretty well dilapidated.

Q. Judge, what has been your experience as to the number of feet the lake will rise and fall?

A. Well in a space of time I don't know as I ever saw it go as much as two feet. It makes the beach more when it goes out; but on a two foot height I don't believe I ever saw it go that much.

Q. And your experience begins we will say, in the year 1865?

A. Well I wouldn't want to put it down as to the heighth of the water, because I was too young to make observations of the water at that time. I had other knowledge, because I used to go down to McIntyre's with telegrams for fish suppers, etc., but I wouldn't want [fol. 880] to say at that age that I was familiar with the heighth of the water.

Q. When should you wish to say that you were sufficiently old to note the rise and fall of the water?

A. O, I don't know, I can't answer that very well, because I don't know. It is a good while ago, but I used to fish there and I used to notice it. There is a certain amount of tide in the river and I would notice it there fishing from time to time, but I don't know when I was old enough to take accurate observations.

Q. When you were working at the Spencer House, did you notice the rise and fall of the waters?

A. It was not very much.

Q. How much was it?

A. I wouldn't say it was a foot at any time in my recollection. I am only putting it as my recollection.

Q. And that would go back to a time when you were 22 years of age?

A. Yes.

Q. And from the time you were 22 until now, your observations down at the Lake side would indicate a variation in the lake level of not to exceed a foot at any two times?

A. I think there was once when it exceeded that.

Q. How much was it then?

A. Perhaps a couple of feet.

Q. On what do you base your recollection as to that?

A. I was a member of a town board at a time when the water was very high at the head of the bay and running over the street down both ways, and being a member of the town board we went down there and inspected it, and that was on account of the water being of an unusual height that caused that then.

Q. Whereabouts was that street?

[fol. 881] A. That was up at the head of Braddock's Bay.

Q. You are basing your recollection of the two foot rise by reason of noting the condition at Braddock's Bay, am I right?

A. Well not altogether that. I had observations down here too, at that time. I saw that the water was very high down here.

Q. What did you notice?

A. Well it was up,———I think it was at the time Mr. Olmstead ran the Hotel, and the water raised up to where there was a breakwater, or rather a walk like what they have got now. I guess it was a wooden walk at that time, and the water came up very close to that.

Q. Where was that wooden walk?

A. It might have been a little in front of where the present walk is, where the Bartholomay property is now.

Q. Do you remember that the water was washing up on the steps of the Bartholomay cottages here two or three years ago?

A. No, I don't remember any such thing. There was no such thing. Two or three years ago?

Q. Yes.

A No, I don't think it ever done that, but this time of the high water is a good many years ago, it was somewhere in 1912 or thereabouts, as far back as that. The last two or three years I have been located down in the Park, ever since the city owned it, and there has never been any such condition as that.

Q. Do you remember any such condition?

A. More than two or three years ago, no, never.

[fol. 882] MILTON MCINTYRE was thereupon recalled as a witness and testified as follows:

Examined by Mr. Moser:

Q. Since you were on the stand this morning, have you been down to the lake and looked at the property that you owned down there?

A. Yes.

Q. Have you observed where the pits are that were dug in connection with this case?

A. The pit on my lot is just east of the cellar.

Q. You have been down and looked at it to-day?

A. Yes sir.

Q. And the pit that is on your lot is how far from your cellar?

A. About a foot.

Q. Did you also go over on Mr. Boshart's lot and see where the pit was there.

A. Yes sir.

Q Where was that pit?

A. About in the center of his lot.

Q. Where is it with reference to where his cellar is?

A. About the center of his cellar.

Q. From the time that you bought that property in 1888, down to the time when the city took it over in 1920, did you pay taxes on it all those years?

A. Yes sir.

Mr. Moser: That is all.

Mr. Oviatt: No questions.

[fol. 883] EMIL BOSHART, witness produced by the defendants, being first duly sworn, testified as follows.

Examined by Mr. Moser:

Q. You are one of the defendants in this action?
A. Yes sir.
Q. You own a piece of land down at Charlotte?
A. Yes, sir.
Q. That is involved in this proceeding?
A. Yes sir.
Q. You and your wife acquired two separate parcels?
A. Yes sir.
Q. One of those you bought from Mr. McIntyre?
A. Yes sir.
Q. About when?
A. About 12 years ago.
Q. How much did you pay for that?
A. $3,100.
Q. After you bought it, did you make any improvements on it?
A. Yes sir.
Q. What did you do?
A. I added a piece to it, myself, about 30 by 30, two stories high.
Q. How much did you spend on the improvements?
A. I spent about $2,000.
Q. And then you and your wife bought another piece in the rear?
A. Yes sir, from the railroad.
Q. How much did you pay for that?
A. $1,000.
Q. Did you make any improvements on that?
A. Yes sir.
Q. How much did you spend?
A. $700.
Q. What did you build on that?
A. Five garages.
Q. During all the time that you have owned this land for the last twelve years, down to the time the city took it over in 1920, did you pay the taxes on it?
A. Yes sir.
[fol. 884] Q. During all that time has any one ever made any claim that they owned that property?
A. No sir.
Q. You had a cellar on your property, did you?
A. Yes sir.
Q. There was a building on the property when you bought it?
A. Yes sir.
Q. Was there a cellar under it then?
A. Yes sir.
Q. And you put a cellar under the new piece that you built?
A. Yes sir.
Q. Are those cellars there now?
A. No sir.

Q. What happened to them?
A. The city filled them up.
Q. Now have you been down there today?
A. Yes sir.
Q. Where, with reference to the place you have your cellar, is the pit that is dug on your property?
A. The pit is about in the middle.
Q. Right in the middle of where your cellar was?
A. Yes sir.
Q. When you dug your cellar, what did you do with the earth that you took out of it?
A. I took some and leveled it off, and I had enough gravel and sand in the cellar to build my walls.
Q. When you dug your cellar, what did you take out, what did you find?
A. Just sand and gravel.
Q. Did you find anything else in your cellar?
A. No I didn't find anything else.
Q. Did you find any logs or trees?
A. I found one big tree.
Q. How far down was that?
A. That was down about six feet or six and a half.
[fol. 885] Q. How big a log was it?
A. O, about two feet.
Q. When you dug down, how far down did you dig?
A. About six feet.
Q. Until you came to what?
A. To water.
Q. You dug down to water?
A. Yes sir.

Mr. Mosher: That is all.
Mr. Oviatt: No questions.

[fol. 886] HENRY F. MARKS, a witness produced and sworn on behalf of the defendants, examined by Mr. Sutherland, testified as follows:

Q. Where do you reside, Mr. Marks?
A. 46 Gorseline Street.
Q. What is your business?
A. Presidnet of the Traders National Bank.
Q. Are you an officer of the Ontario Beach Hotel and Improvement Company?
A. Yes, sir.
[fol. 887] Q. What is your position with tnat company?
A. Secretary and treasurer.
Q. When was that company formed Mr. Marks?
A. April 1906.

Q. Your company became the owner of the leasehold involved in this proceeding of the land east of Broadway?

A. Yes.

Q. You became the owners of the 50 year lease?

A. Yes.

Q. That was given in 1853 by the New York Central Railroad to Graig & Upton?

A. Yes sir.

Q. Who were the various lessees or owners of the lease between Craig & Upton and your own company, the Ontario Beach Hotel and Amusement Company?

A. There was another company, I think it was called the Lake Ontario Beach Improvement Company.

Q. How long did Craig & Upton, the original lessees continue to hold their leasehold before they turned it over to their successor company, do you remember?

A. I think they only had it a short time before they organized the company.

Q. Then they turned their lease over to the company that was organized by them?

A. Yes.

Q. How did the Ontario Beach Hotel and Amusement Company acquire their leasehold?

A. Through foreclosure.

Q. Do you remember that Palmer bid in the property and then assigned it to you?

A. Yes sir.

Mr. Sutherland: That is the way the bill alleges in this case Your [fol.888] Honor and it is correct. I am merely following along that line.

Q. When did the Ontario Beach Hotel and Amusement Company enter into possession of these premises?

A. April 1906.

Q. And you continued to hold possession until what date?

A. To April 1920, when the city took possession.

Q. From 1906 to 1920 were you continuously in possession of the property covered by your lease?

A. Yes.

Q. Do you know of your own knowledge as to possession of the leased premises by your predecessors in ownership of the lease, who held it before you did, who occupied it?

A. The former Amusement Company, the Lake Ontario Beach Improvement Company.

Q. How long did that company occupy the premises to your knowledge before 1906?

A. I think they occupied it from 1883 until 1906.

Q. Were you living in Rochester in 1883?

A. Yes sir.

Q. How long before that time?

A. I was born in Rochester in 1865.

Q. You became acquainted early in life, I suppose Mr. Marks, with the beach at Charlotte?

A. I was about 11 or 12 years old, that is my first recollection.

Q. I will not ask you anything about conditions there before the lease was made. Do you remember when Craig & Upton took possession of the leased property down there in 1883?

[fol. 889] A. Yes.

Q. What was its condition as to buildings when your company took possession of the property? It appears here, Mr. Marks, to save a little time, that the Spencer House was burned in 1882.

Mr. Oviatt: I object to this. I object to counsel stating facts to the witness in order to lead the witness into a situation. This witness may testify or he may not.

Mr. Sutherland: I withdraw the question to save time.

Q. Mr. Marks, will you tell the Court what buildings, if any, were on this leashold property at the time Craig & Upton took possession of it under the lease?

A. Well I think the old barns and sheds were perhaps all that were left at that time.

Q. Where did they stand?

A. They stood south of the Spencer House.

Q. Was the Spencer House standing when Craig & Upton took possession of it?

A. Well I don't know whether they had possession before it burned or not.

Q. Do you know what Craig & Upton did in regard to improving that property covered by the lease?

A. Well Craig & Upton, or the successor company took the Hotel Ontario and the Auditorium?

Q. Was the Auditorium a separate building from the Hotel Ontario?

A. Yes, directly east of it, and they built a place called the Vienna [fol. 890] Cafe, and then they built two buildings over near the river. One was for a bowling alley and the other was a saloon and sitting room and some smaller amusement places.

Q. Do you know what Craig & Upton did in regard to laying out walks and roadways, if any?

A. There were some walks laid out there.

Q. How about seeding down the ground. Do you know whether any of that was done?

A. Well there was a grass plot north of the buildings when we took it over, I presume they had something to do with that.

Q. You have no personal knowledge of the planting of that grass?

A. No.

Q. That was north of the row of buildings in which the Hotel Ontario and the Auditorium are?

A. Yes.

Q. And the Hotel Ontario is still standing?

A. Yes.

Q. And the Auditorium is still standing?

A. No, not the original Auditorium. That burned and the present company replaced it with the present building.

Q. When did that happen?

A. O-, I should think about 1900, around there. I am not sure as to the time of the fire, but I should think it was about that time.

Q. During the occupation of this leasehold property by the Ontario Beach Hotel and Amusement Company from 1906 down to 1920, what is the fact as to the property being enclosed?

A. It was enclosed on three sides during all that time.

[fol. 891] Q. What three sides were they?

A. The east, west and south sides.

Q. That would be then, along the east line of Lake Avenue and the north line of New Beach Avenue; and where was the fence along the river?

A. Well it was inside the pier, I think, about three feet.

Q. You mean just three feet west of the pier?

A. West of the inside line of the pier.

Q. How far did those fences extend with reference to the water of Lake Ontario?

A. The fence on Lake Avenue extended about fifty feet I think, into the water.

Q. And along the pier, do you know how far it went?

A. Well, I think it went just to the water's edge there.

Q. So the property then, that is, east of Broadway involved in this present lawsuit, was enclosed by a fence on the west and south and east sides?

A. Yes.

Q. And the north side was Lake Ontario water, was it?

A. Yes.

Q. Did you charge admission to that property?

A. We did.

Q. During the whole period from 1906 to 1920?

A. Yes.

Q. What about the payment of taxes on that property Mr. Marks, during that time?

A. The Park Company paid the taxes.

Q. Was it taxed for village purposes and county and state purposes?

A. Yes.

Q. You mean the Ontario Beach Hotel and Amusement Company paid the taxes?

A. Yes.

Q. Do you know as a fact whether they were assessed to you or assessed to the Railroad, or both?

A. I think maybe the taxes were divided. The real estate was [fol. 892] assessed to the New York Central and they paid that and the other tax was assessed to the Ontario Beach Company.

Q. What was assessed to the Ontario Beach Company?

A. I presume the tax on the buildings.

Q. There was something assessed to you or your company?

A. Yes.

Q. Now tell the Court substantially what improvements your company, the Ontario Beach Hotel and Amusement Company, made on that property during the fourteen years that you have mentioned?

A. Well we remodeled the Hotel Ontario and we remodeled the Auditorium building. We remodeled the two barns, and built a number of other buildings there and also laid out the cement walks and roads and built new fences.

Q. Did you build any bath houses?

A. Yes.

Q. The Scenic Railway?

A. The Scenic railway, yes, a number of buildings along the street nearest the river, called the midway. That was lined with buildings on both sides part of the way.

Q. Now, not asking you to get down to any fine point, I want a general approximation, how much did your company spend during the fourteen years that you occupied this leasehold, expend there in the way of permanent improvement, speaking generally?

A. O-, approximately $250,000.

Q. The Hotel Ontario and Auditorium was built by your predecessors in interest in the lease?

A Yes.

[fol. 893] Q. So you have not included that in your expenditures?

A. No sir.

Q. Could you give the Court with reasonable certainty or within reasonable limits any idea of what the buildings must have cost your predecessor under the lease, the Hotel Ontario and the Auditorium?

A. Well, there was a hundred thousand dollars preferred stock paid in and they had an indebtedness of one hundred sixty thousand, so there was two hundred and sixty thousand they had to start with, so that there was approximately two hundred thousand dollars spent on the improvement.

Q. Are you able to say that the improvements put on there by your predecessors as lessee, would have been over one hundred thousand dollars? Is that a conservative estimate?

A. I should say considerably over that.

Q. Let me ask you for how long a time to your knowledge was this property north of Beach Avenue and east of Lake Avenue kept enclosed by your predecessor as lessee?

A. I think about ten years.

Q. You have personal knowledge that for that length of time it was enclosed?

A. Yes.

Q. That would be 1906——

A. About 1886 I should think, about that time. It was enclosed about ten years before we took it, and we had it 14 years, so that it was enclosed probably 24 years.

Q. Ten years back of 1906 would be 1896?

A. Yes.

[fol. 894] Q. So you wish to be understood that you recall at least from 1896 down, that property was enclosed?

A. Yes.

Q. And before enclosure, was it the same as the others, how was it then?

A. I think there was an iron fence on the Lake Avenue side and the river side. I have forgotten whether the iron fence went all the way or whether it was partly wood on Beach Avenue.

Q. Have you any recollection prior to 1896 as to whether there was any enclosure about that Park?

A. I think it was enclosed prior to that, and then for a time they threw it open to the public for two or three years.

Q. And when was it thrown open to the public?

A. Well if it was re-enclosed in 1896, probably 1892 or 1893.

Q. Now what is your recollection as to what Craig & Upton and their successor company did regarding any upkeep of the land between Lake Avenue and the River and north of the present line of Beach Avenue. What did they do with regard to its care and upkeep, and so on.

A. Well they operated it as an amusement Park, rented it for concessions and various matters and also rented the Hotel Ontario.

Q. Do you know whether or not they charged admission to the grounds?

A. They did for a time, while it was enclosed, and the fences were up. It was either by admission charge or the New York Central tickets. The New York Central station was inside the grounds, and if you came down on the train, you used your ticket for admis-

[fol. 895] sion.

Q. Prior to 1896, when the grounds were thrown open to the public, do you remember whether there was any admission or anything like that charged during that period?

A. No there was no admission at that time.

Q. Who occupied this leasehold property at that time?

A. The Lake Ontario Beach Improvement Company.

Q. Were concessions in operation there?

A. Yes sir.

Q. Do you know of anybody else th-t has occupied this land or any part of it, from Craig & Upton's lease in 1883, down to 1920, when the city took over the property, except the lessees, or these concessionaires that the lessees permitted to occupy it?

A. No sir, those were the only occupants.

Q. During all that time, was your title, under your lease, interfered with by anybody to your knowledge?

A. Never.

Q. Did anybody during all that time make any claim on your company that it was theirs, and that you had no right to occupy it?

A. I never heard of any such claim.

Q. When did you first hear of any claim being made by the State of Massachusetts upon any of this property?

A. Well since the city took possession.

Q. Since the commencement of this action, the Ontario Beach Hotel and Amusement Company obtained the deed which I show you from the Upton Company, did it?

A. I remember something about that deed being granted.

[fol. 896] Mr. Sutherland: I offer in evidence, Your Honor, a deed made by the Upton Company to the Ontario Beach Hotel and Amusement Company, April 27, 1923, recorded the 30th of April 1923, in Monroe County Clerk's office, in book 1099 of Deed at Page 395. And may I say with reference to that deed by way of explanation, that the Bill in Equity here called attention to a small piece of this ground over near Lake Avenue close to the water, that had been bid in on a mechanic's lien foreclosure years ago by the Upton Company. It never was out of possession of our client, but to clear that thing up we obtained this deed from the Upton Company which I have just put in evidence, so that that disposes of that apparent defect in the title, which existed when the bill was filed. That is the reason I am putting it in evidence so that we need not bother with it again.

Paper last above referred to, received in evidence and marked Defendants' Exhibit 26.

Mr. Sutherland (to Mr. Oviatt): *Q.* This may be considered if you wish, set up in your bill adversely to your title, and ask to have it removed as a cloud. That is all right, we do not stand on that at all.

Cross-examination.

Mr. Oviatt:

Q. Just for the purpose of certainty, will you describe the premises covered by the lease you mentioned, under which you held?

[fol. 897] A. It is bounded west by Lake Avenue, and on the south by Lot 20, I think we had a part of Lot 21 included, in this lease, and on the east by the river, and the north by Lake Ontario.

Theodore E. Knowlton, witness sworn on behalf of the defendants, examined by Mr. Moser, testified as follows:

Q. Mr. Knowlton, what is your age?
A. 51.
Q. What is your occupation?
A. Engineer.
Q. Where did you receive your engineering education?
A. Rensselaer Polytechnic Institute, Troy.
Q. When did you graduate from that institution?
A. 1893.
Q. And since 1893 have you been engaged continuously in your business as an engineer?
A. Practically.

Q. What degree did you receive at the Rensselaer Polytechnic Institute?

A. Civil Engineer.

Q. Will you tell us what, since your graduation, has been your experience in engineering work?

A. Immediately after graduation, I had the usual young engineer's experience in surveying and construction work and railroad construction and the surveying that goes with railroad location and designing, first on the maintenance of signals on the New York Central Railroad; later on construction of heavy masonry on the Rome and Watertown division of the New York Central which included excavation of foundations, erection of masonry abutments [fol. 898] and arches, also in frame structures and their foundations. And later the location and construction of railroads in British Columbia, Alaska and Colorado, all of which included a good deal of heavy excavation and steam shovel work, and then later of building the bridge approaches notably, Charlottestown, Prince Edwards Isle. Then I was engaged on the lower Mississippi River at New Orleans in the construction of abutments for levees. And in Colorado on railroad construction work and tunnel work, and later on hydro-electric development in northern New York for the St. Regis Paper Company.

Q. What do you mean by hydro-electric work?

A. In the digging of the canals and the building and construction of the foundations for the power house and the power house itself, and the mill foundations, and then prior to that I located for the approach in New York Harbor of the Lackawanna Railroad slips, and things of that kind, mostly having to do with excavation and construction of railroad structures.

Q. What experience have you had, if any, regarding the examination of soil to become familiar with its structure?

A. Well in attempting to construct any building, the matter of the foundation is important, and test pits and borings are put down and the character of the ground you are going to build on is carefully examined. Later, I got away from structural engineering into the examination of soils for agricultural projects, where the character of the soil was important, and in that connection I looked over soils and lands in Porto Rico and Cuba, in Virginia and Mary- [fol. 899] land and in the northwest and more recently I had to do with conducting the draining and development of the Oak Orchard Marsh west of here at Elba.

Q. That is at Elba, in the State of New York?

A. Yes, in Genesee county and Orleans County, and in connection with that agricultural work, I had a great deal to do with the examination of soils and vegetation.

Q. In connection with that work, did it become necessary for you to examine the soil itself and pass upon its nature and condition?

A. O-, very much so.

Q. Have you recently examined the soil in the pits dug by the plaintiff in this action at Ontario Beach Park?

A. Yes.

Q. Now I am going to ask you specifically with reference to various pits. My inquiries are directed principally toward the pits north of Beach Avenue and west of Lake Avenue. You know these pits by numbers, do you? The numbers applied to them by the Massachusetts Engineer?

A. Yes.

Q. Now pit No. 8, you examined that did you?

A. Yes.

Q. What did you find that pit to show with reference to the soil?

A. The first two tenths of a foot from the surface was a miscellaneous mixture, that is, a mere skin on the surface; and then below that for 3.2 feet was a deposit of yellow clay; below that three tenths of a foot was greenish colored clay, differing only in color. Then [fol. 900] there was a thin layer one tenths of a foot of vegetable matter,which I have called muck, and then three tenths of a foot of lake sand, and two tenths of a foot of this vegetable matter, and then underneath that lake sand to the bottom of the pit.

Q. Will you tell us whether in that pit you found any evidence of previous excavation?

A. Yes, on the south side there was a pipe and on account of the pipe having been laid in the ditch, obviously I made my measurements on the north side, in order to take the original ground.

Q. That is the laying of the pipe indicated that there had been a previous excavation there?

A. Yes, it destroyed the value of that side as an original cross section.

Q. Could you tell from the examination of the soil—on what side did you examine the soil?

A. On the north side.

Q. Could you tell from the examination of the soil on the north side of the pit whether it came there by natural processes or whether it was put in artificially by the hand of man?

Mr. Oviatt: I object to that as not the subject of expert testimony and no foundation being laid as to the description of the soil.

Mr. Moser: I will withdraw the question for a moment and I will ask the witness whether in his experience in engineering and subsurface construction he has been required to form impressions as to whether or not soil or substances found beneath the surface had been [fol. 901] filled in artificially or deposited naturally?

A. That is a thing which has to be decided in almost all foundations; as to what kind of country you are going to build on or build in. Frequently in making excavations for foundations, you run into disturbed conditions where there has been previous excavation, many years before possibly, and that point always comes up as to whether it has been disturbed or not.

Q. Has that frequently arisen in your experience?

A. Yes sir.

The Master: He may answer the question.

Question read as follows: "Could you tell from the examination of the soil on the north side of the pit whether it came there by natural processes or whether it was put in artificially by the hand of man?"

A. Yes, I could. It was put there by——

Q. Just a moment, what is your opinion as to whether that soil was laid there naturally or artificially?

A. It was obviously put there naturally.

Q. Will you tell us why that was obviously so?

A. When you make a straight cut through a soil it has certain characteristics that if you are familiar with those things, you know almost instinctively. And very specificially in this case, you have a finely divided clay which is laid in there evenly and homogeneously without any evidence of foreign matter or mixture of materials, and there is no doubt in my mind that that was put in there by water, carried down presumably from up the country and deposited when [fol. 902] the water lost its velocity as is usually the case when you come to a spread out area.

Q. Now, on the opposite end of that pit, you found a different condition, did you, where there had been an excavation?

A. The fact that the pipe was there, made me throw it out without study, as an indication of anything, because here we had the undisturbed north side which showed actually the condition of things.

Q. So that you did not make your notes as to the south side at all?

A. No because I did not think it was worth while to make notes on that side, which had no value.

Q. How much of the soil, which you found in that pit, did you consider having been filled artificially?

A. Two tenths of a foot from the surface down, just a skim on top.

Q. About two inches?

A. Well about two inches and a half.

Q. I show you plaintiff's exhibit 37, and ask you to indicate on that plan the difference between your observations and the observations indicated thereon?

A. Judging from the scale of this thing, my two tenths is exactly at an elevation of 250.7.

Q. That is, it is the two tenths at the top of the pit which is there indicated as soil?

A. Yes sir.

Q. By that you mean top soil, grass?

A. Yes, any top soil to that depth is likely to be disturbed, and so I called it miscellaneous material in my notes, and came down to a [fol. 903] point at which I thought it had not been disturbed, which was two tenths of a foot.

Q. From that down, it was what?

A. Clay of a yellow color.

Q. How far?

A. Three and four tenths feet.

Q. Is that what is marked loamy sand on that diagram?

A. Practically the same.

Q. Did you find any loamy sand in that pit?

A. No, what he calls loamy sand, is clearly a yellow clay.

Q. And is not sand?

A. No sir.

Q. What is the difference between loamy sand and yellow clay?

A. Sand is the fine particles of silica and when it is loamy sand, it is mixed with clay and other material, generally of a very fine structure mixed up, thoroughly mixed. Now, I found that section to have sand lacking, I found it to be practically all clay.

Q. Beneath that clay, you did find some sand. You found some muck and then some sand? What did you find immediately underlying the clay?

A. A finer structure of clay, which was greenish in color and then vegetable matter, which grew there naturally before the clay was deposited on top of it. Then underneath that, a thin layer of sand and then another thin layer of vegetable matter. Then we got down to lake sand and no further evidence of vegetable matter. The bottom of the pit was there.

Q. And you concluded that that was all laid there by natural processes?

A. Yes sir.

[fol. 904] Q. Now will you refer to pit No. 29, and describe what you found in that pit?

A. From the surface down one foot was miscellaneous material, which showed a more or less disturbed condition, and then came lake sand in its naturally deposited state. The thickness of that sand was 1.6 feet and then came two tenths of a foot of this vegetable matter and then two tenths of a foot of lake sand, and then two tenths of a foot again of vegetable matter, and underneath that and to the bottom of the pit, lake sand.

Q. That is trench No. 29?

A. Yes sir.

Q. Did you find any evidence in that pit of any previous excavation or don't your notes show?

A. I find no note of that on my notes. I took the measurements on the north side because I always took the side which was undisturbed.

Q. From your examination of the north side of that pit, what was your opinion as to whether or not any of it had been filled by artificial means or whether it was deposited there naturally?

A. I am perfectly certain that beginning at a foot below the surface, it has all been naturally deposited and not disturbed.

Q. The top foot you say was miscellaneous material which looked as if it has been disturbed?

A. Yes, it is of doubtful origin, and I did not pay any attention to it.

Q. From a foot down, you found it all lake sand?

A. Naturally deposited material. Firt lake sand and then muck and then sand and muck.

[fol. 905] Q. What was there to indicate that it had been naturally deposited and not deposited by the hand of man?

A. The lake sand when it is put in by water, you see little stratifications, and there will be a trace of little different colored materials, water laid. It is hard to describe. Anybody that is familiar with those things can tell at a glance.

Q. I show you exhibit 42, which is a plan or cross section of pit No. 29, and ask you how your observations compared with that?

A. The section is the same except that the detail on the bottom of the pit on this organic matter on what they call loamy sand is what I have classified as miscellaneous material. What they have called sand and some gravel, I call lake sand.

Q. What is the elevation of the ground surface as shown on that diagram?

A. 250.4.

Q. Assuming the same ground elevation, at what did you find the elevation of the top of the natural fill?

A. 249.4.

Q. Now, will you turn to pit No. 28 and tell us what you found in that pit? At which end or side did you begin?

A. The south side. May I say why I sometimes took the north side and sometimes the south side?

Q. Yes.

A. Thes pits are three feet wide and perhaps six or seven feet long and to a depth where certain material has not been disturbed. I got down in these pits and sat down in them and looked at each side, [fol. 906] both ends and both sides, in order to determine which side represented the fairest measurement as to the depth and thickness of strata, and took the side which was undisturbed, hence sometimes I might be on the north side and sometimes on the south side. It makes very little difference which side you measure on as to the geographic location of the measurements, because the pit is too small in any way compared to the whole area. So that in this pit 28, I found miscellaneous material for a depth of 2.9 feet from the surface down. Then comes 1.1 feet of yellow clay, then two tenths of a foot of sand and clay, then three tenths of a foot of vegetable matter, then after that at a depth of 4½ feet comes lake sand to the bottom of the pit.

Q. What portion of that in your opinion was naturally laid and what portion of it, if any, was artificially placed there?

A. It is obviously naturally laid to a point 2.9 feet from the surface. That is the first 2.9 feet in depth is either uncertain or artificially laid and my feeling is that it is artificial, the natural surface beginning at 2.9 feet from the surface.

Q. Then you found down for a depth of 2.9 feet that the soil had been disturbed?

A. Yes.

Q. And below that you found what?

A. I found it undisturbed, and immediately below it is yellow clay of the same characteristic appearance as in that first pit No. 8. [fol. 907] Q. I show you exhibit 41, which is a cross section of

pit No. 28. Will you tell us in what respect your observations differ from that cross section?

A. Well, I immediately disregarded any detail to a depth of 2.9 feet. This cross section shows details of strata, a loamy sand, and my observations began at a depth of 2.9 feet which is an elevation of 248.5. At 248.5 they show at that level loamy sand and clay, and at 247.4 they show organic matter and sand, which is practically what I show

Q. Do you show loamy sand and clay?

A. No, I said that is yellow clay.

Q Now, I want to know what the difference is between theirs and yours?

A. What they call loamy sand and clay, is clay.

Q. Is there any sand in it?

A. Not visible to the naked eye.

Q Did you examine that material which you called clay, to determine whether it had been naturally laid or artificially laid?

A. Obviously naturally laid.

Q. And in your opinion, how was it laid? By what process?

A. By being brought down with the wash of water and the water losing its velocity and dropping its load of clay.

Q. At what elevation, did you find the natural fill?

A. At 248.5.

Q. And in that exhibit, that diagram, the natural fill is indicated at what point?

A At 247.7.

Q. You disagree to that extent?

A. I disagree by nearly a foot.

Q. Now right here, will you tell us if you made any investigation [fol. 908] to discover the source of that material which you call clay?

A. Well, there was no clay coming out of the lake, certainly, and so I went back up the country, inland, and found a draw, a natural water course with some branches, and was fortunate in finding a steam shovel place up there, where there had been some grading, and they cut into this bank, which is north of the Rome, Watertown line.

Q. And that is up this natural water course?

A Yes, on the side of it, on the slope.

Q. How far from this territory in question?

A Why, four or five blocks up that railroad. The prospect pit was just there at the railroad.

Q. What character of soil did you find where you found the ground cut open there?

A. I was interested to find out in this prospect pit just north of the railroad and farther up several hundred feet where the steam shovel was, there was loamy sand very finely divided sand mixed with clay and yellow in collor. *Q*. Now you see when you have a heavy wash, that storm water comes down the draw, and will carry out with it soil and the first soil that comes off is the clay which travels ahead of the sand.

Q. Why?

A Because it is lighter and has more ability to float easier than the fine particles of silica of the sand. So that you would naturally expect to find clay down on that flat where the stream widens out, and [fol. 909] that is what I did find in these pits, and in a condition like that you have your top strata up the hill coming down and becoming the bottom strata down on the flat, where the water spreads out and loses its velocity so that the finding in all these pits of the sand and clay from up the stream made a situation which reinforces my observation that the clay in the pit was naturally deposited.

Q. Is this land where these pits were located, the flat at the bottom of this natural water course?

A. Yes, that is a flat country.

Q. Describe to us this territory as it is?

A. Starting at the Lake Beach, you come back on to this flat area where the amusement park is down there and then you come back on the country rising gradually, presumably a hundred years ago it was more abrupt than it now is, and you go up the country and see there this draw, there is a draw there with some branches to it, and the material that came out of that draw is naturally deposited at the point where the water loses its velocity and that point is of course on the flat which you find where this amusement park is. The water spreading out loses its velocity and drops its material.

Q. Did you make some examination of the pits on the other side of Lake Avenue, that is to the eastward of Lake Avenue.

A. Yes.

Q. And in some of those pits did you find evidence of what you believe to be artificial material?

[fol. 910] A. Yes.

Q. What was the character of the material you found to be artificially deposited?

A. Yellow sand. *Q.* Quite different from anything I had seen on the west side of Lake Avenue.

Q. You found none of that yellow sand on the west side of Lake Avenue?

A. I would have to look at my notes, I think there was some yellow sand up in one of the pits, but I would have to look at my notes. I am quite sure there was no yellow sand as I remember it west of Lake Avenue.

Q. In a great many of the pits east of Lake Avenue, did you find yellow sand?

A. It was the main characteristic.

Q. And that you believe to be deposited artificially?

A. Yes.

Q. And this yellow clay, as you call it, is a very different material?

A. O, quite.

Q. Now, to go back again to the property west of Lake Avenue. Take up pit No. 30 and describe to us the conditions you found in pit No. 30?

A. Well, pit No. 30 is so disturbed, that it is of no value from which to draw conclusions. Previous excavations cut it all up, so I threw it out as of no value.

Q. How far down did you find evidence of previous disturbance?
A. All the way down.
Q. Do you mean down to the bottom?
A. Yes, to the bottom. It is of no value. A pit 20 feet away might be of value, but this pit is of no value.
Q. That is, you found conditions that the land had been pre-
[fol. 911] viously disturbed?
A. Disturbed all the way around, yes.
Q. I show you exhibit 40, which purports to be a cross section of pit 30, and ask you what difference, if any, you found in that pit.
A. I found nothing to testify to. The cross section shows that there is a three quarter inch iron pipe noted as running north and south in that pit, at a depth of about three feet. That alone shows that the trench must have been dug down there. And I cannot discuss that pit because it is of no value.
Q. Does that stratification shown on that diagram, exist in that pit?
A. I would not say so, it is too much mixed up, that pit is.
Q. Now take pit No. 31. Tell us what you found in that?
A. Exactly the same situation. Anything I have said about pit No. 30, applies to pit 31.
Q. Tell us what you did find in pit 31.
A. That the ground is disturbed on all sides of it, and it is of no value from which to draw conclusions.
Q. What do you mean by disturbed on all sides?
A. By previous excavations.
Q. How far down?
A. To the bottom of the pit.
Q. I show you exhibit 39, which purports to be a cross section of pit 31, and ask you if that represents the condition that you found in that pit?
A. Yes, more accurately than in No. 30, because that indicated that it is all kinds of miscellaneous material. They call it mis-
[fol. 912] cellaneous fill, bricks, broken concrete, wood, loamy sand and timber, on the south end; so that I made no attempt to sketch in my notes a section of this kind, but this section rather confirms my idea that it has been very much disturbed.
Q. That is, there had been a previons excavation there?
A. O, yes.
Q. And that condition exists clear to the bottom of the pit?
A. Yes.
Q. Now, pit No. 32, will yon please tell us what you found in that?
A. The first 2.2 feet in depth is miscellaneous material, below that for 1.4 feet is a yellow clay, the same material that I previously classed as yellow clay, below that four tenths of a foot of a muddy lake gravel, and below that lake gravel and sand.
Q In that pit, how much artificial fill did you find?
A. 2.2 feet from the surface.

Q. And immediately below that 2.2 feet, you found what character of material?

A. Yellow clay.

Q. And the same yellow clay that you found in the other pits which you say was natural?

A. Yes.

Q. I show you Exhibit 28, which purports to be a cross section of pit 32, and ask you what difference there is between your observations and that sketch?

A. It shows miscellaneous material down to the same depth, 2.2 feet that I had, and then at the point where I say that the natural surface begins, he shows a loamy soil and clay and fine sand, where I show this yellow clay.

[fol. 913] Q. Was that loamy sand and clay and fine sand there?

A. I didn't see it.

Q. Don't you know whether it was there or not?

A. No, it was not there.

Q. What they call that is yellow sand.

—. ——.

Q. Then the man who made that observation is mistaken?

A. In my opinion, yes.

Q. That yellow clay you believe to have been naturally deposited?

A. Obviously, yes.

Q. Will you tell us the elevation of that naturally deposited material in that pit?

A. 249.7, on that line of that cross section.

[fol. 914] Q. That does not get on the record. What *to* you mean? Describe the line so anyone reading it will know what you mean?

A. Well, that elevation is well up into his artificial fill.

Q. What *to* you mean by that line?

A. The level of 249.7, which is marked, "top of natural fill," is well up into his artificial fill.

Q. You mean well up into what is indicated as artificial fill?

A. As indicated by the yellow.

Q. On that cross-section which you are examining?

A. Yes, sir.

Q. Do you believe that he is mistaken about that, what he calls artificial fill?

A. We differ by about 1.3 feet.

Q. All right, that's all. Now, I am going to pass to the line of pits numbers 34, 33, 46, 45, 44 and 43, which are pits appearing on the section D-D on the profile, plaintiff's exhibit number 46. We will start at the south end of pit number 34. Tell us what you found in that pit, if you found any artificial fill in that pit?

A. There was artificial fill down to a depth of 2.6 feet.

Q. And at what elevation do you find that?

A. 249.6.

Q. And below that you find what?

A. Clay to a depth of—for a thickness of 2.3 feet.

Q. I show you exhibit number 35, which is cross-section pit 34, and ask you how, if at all, you differ from that cross-section?

A. Down to a depth of 2.6 we agree practically, and for the next 2.3 feet on this cross-section it is called loamy sand and clay, and I call it clay.

[fol. 915] Q. Well, now, it is loamy sand and clay?

A. No, sir, it is clay.

Q. And can you tell by examining it whether it was artificial clay deposited or naturally deposited?

A. It was natural deposit.

Q. The same character of clay that you found in the other pits?

A. Not so yellow in character.

Q. You believe it was deposited there in the same way, however?

A. Deposited in the same way, yes, sir.

Q. You find the elevation of the natural deposit in that pit as what?

A. 249.6.

Q. Now, we pass to the next pit, which is 33. Tell us what it was you found in that pit?

A. Miscellaneous material, including slag, to a depth of 1.8; below that for 1.8 feet more, clay; below that, beginning at a depth of 3.6 lake sand.

Q. Now, I show you exhibit number 36, which purports to be a cross-section of Pit 33, and ask you how, if at all, you differ from that?

A. Well, I find my lake sand at a few tenths higher elevation than is indicated on this cross-section. Now, this yellow section here indicating an artificial fill, the bottom of it is at 247.5. Now, the bottom of the artificial fill, definitely, in my opinion, is at 249.3, which is a difference of nearly 2 feet.

Q. That is, your conclusion is that the ground was naturally filled by natural process to an elevation of 249.3 feet?

A. Yes, sir, which is 1.8 higher than is indicated on this cross section.

[fol. 916] Q. Now, where you indicate clay, what character of material is indicated on that diagram?

A. Loamy sand.

Q. Did you find loamy sand there?

A. No, sir. I found clay as before.

Q. Now, Pit 46 is the next. What did you find in Pit 46?

A. Miscellaneous material to a depth of 2½ feet, and then .9 of a foot, and then 1.1 feet of clay. Below that, lake sand.

Q. At what elevation did you place the natural undisturbed condition of the soil?

A. 248.7.

Q. I show you exhibit number 50, Trench number 46, and ask you how your conclusions differed from that, if any?

A. Well, as indicated on the south cross-section by the yellow tint, they placed the natural surface at an elevation of 247.8.

Q. And you place it where?

A. I place it at 248.7.

Q. And what material is shown on that diagram in that intervening distance?

A. They show on the diagram for the first foot and a half, miscellaneous material and soil.

Q. I know, but what do they show in that space that they call artificial fill that you call natural?

A. They call it clayey soil, miscellaneous glass and wood.

Q. Did you find that there?

A. Their measurements of this cross-section is on the south side. I took the undisturbed east side where the cross-section was more typical of what the condition was.

Q. Well, now, on the south side was there anything to indicate that the south side had been disturbed?

A. Yes. There was a sewer tile or a tile pipe in there, vitrified pipe, which must obviously have been put in a ditch, and there-
[fol 917] fore I didn't examine the south side except to throw it out.

Q. That is, on the south side there had been a previous excavation?

A. Yes.

Q. And your examination was on the east side?

A. On the east side.

Q. Where it was undisturbed?

A. Where it was undisturbed.

Q. In making these measurements and elevations did you make the measurements and computations yourself?

A. Oh, yes, sir.

Q. Now, Pit 45——

Mr. Abbot: Did you say 2.9 or 2.5 for the miscellaneous?

Witness: At what point?

Mr. Abbot: On Pit 46?

Witness: Well——

Q. That is, the depth of the artificial fill, he means.

Mr. Abbot: Yes.

A. Oh, the natural surface began at a depth of 2.5. Is that what you want to know?

Mr. Abbot: Yes. I couldn't tell whether you said 5 or 9.

Witness: Yes. .5.

Q. Now, turn to Pit 45 and tell what you found in that pit?

A. Miscellaneous material for a depth of .3 of a foot, an artificial fill of lake sand 1.4 feet in thickness underneath the first layer.

[fol. 918] Q. That is, you found sand, lake sand, there but evidently not water laid sand?

A. Obviously not water laid.

Q. As it was disturbed lake sand?

A. Yes, sir. Then, underneath that was the undisturbed lake sand.

Q. Well, now, I show you exhibit 51, which is cross-section, Pit 45, and ask if you agree with that?

A. Yes, I practically agree with that.

Q. You practically agree with that?

A. Yes.

Q. Now, Pit 44?

A. Why, for a depth of 1.2 feet miscellaneous material; underneath that undisturbed lake sand, fine gravel.

Q. I show you exhibit 52, which is Pit 44, and ask you if you disagree with that?

A. On the south cross-section, yes, sir, it is essentially the same.

Q. You are essentially the same as the south cross-section?

A. Yes, sir.

Q. Now, Pit 43?

A. Pit 43 had a deposit of clay for a depth of 2 feet, and then lake sand. Now, here was a case where the clay was artificial deposit. There is some slag at the north end of the pit above the lake sand and other indications, other pieces of foreign matter which indicates, together with the structure of the deposit, that it was artificial.

Q. That clay that you found there you think was not naturally laid?

A. Well, it couldn't have been because it had some slag in it.

Q. Well, did you find differences also in the structure of the clay itself?

A. Yes, sir. The appearance didn't have the appearance of being naturally laid by water.

[fol. 919] Q. I show you exhibit 53, which is Pit 43, and ask you whether you disagree with that?

A. Why, the south end of this cross-section indicates the natural surface to be .3 lower than I place it. They characterize the material as clayey loam, and I call it clay. It has some other material in it like slag. And on the north end of their cross-section they indicate rock, gravel, and clay loam.

Q. And what did you find it to be?

A. I only observed and only made note of the west side, which showed this clay artificially deposited.

Q. That is, it was a different structure of clay than that which you found in the pits which you said was natural?

A. Yes, sir. We differ, my notes on this cross-section differ really in the elevation of the lines dividing the artificial and the natural fill.

Q. You differ by how much?

A. There south end shows it's .3 lower than my notes.

Q. What do you make the elevation of the natural fill to be?

A. 249.1.

Q. Now, I show you exhibit number 46, which is—what do you call that, a profile cross-section?

A. Longitudinal section, in this case.

Q. Well, it is a cross-section of those six pits that you have just recalled.

Mr. Abbot: It is a cross-section running more or less north and south.

[fol. 920] Q. Now, referring to section D-D, which purports to be a cross-section of Pits, 43, 44, 45, 46, 33 and 34, with the artificial fill indicated in yellow and natural fill indicated in gray?

A. That is, this one here, C-C?

Q. D-D?

A. D-D. I see.

Q. In your opinion as an engineer does that correctly represent the natural surface of the ground at that point showing artificial filling was done?

A. Well, I don't know. I don't know what is down in here between these pits. You can't tell——

Q. Well, now, I am asking you as an engineer. You know what information you have. That is drawn as a cross-section of these other particular pits about which you have just testified. Will you tell us whether in your opinion that cross-section is a proper engineering deduction from the information which you found in those pits.

Mr. Oviatt: Well, now, I object to that. That's plainly incompetent for one expert to characterize the conclusion of another expert. He may state whether or not he got any cross-section, and he may show the difference between his and their's, but as to characterization, I think that's improper.

The Master: I don't think expert witnesses object to being characterized by each other.

Mr. Oviatt: No, counsel is objecting this time.

The Master: Counsel ought not to. I will hear him.

[fol. 921] Q. What have you got to say?

The Master: Or is it a deduction which you would have made from your examination of the pits?

A. No, I would not feel safe in drawing that line showing the surface of the natural fill from so few pits. For instance, when I had gotten to Pit number 45 I looked at the location northward of Pits 44 and 43. It was getting late in the afternoon and I said, "Oh, this sand level runs up there and I won't go into those pits because I will find sand very near the surface," and I went home. The next day I came back and said to myself, "Well, now I have time to look at those pits, so I guess I will go and look at them." And I was very much surprised to find the condition quite different from what I had deduced the night before when I was in a hurry to get home. In short, if I had stopped at 49 and drawn that line myself I would have drawn it up this way.

Q. Well, now, that doesn't show on the record.

A. I would have drawn it much nearer the surface of the ground than it is drawn on this cross-section, and I would have been wrong.

Q. Well now, how do you know you would have been wrong?

A. Well, let me continue. I would have been wrong judging by the actual showing of Pitts 44 and 43 when I got into them. Now, with pits spaced at this distance you have no right to draw a straight line between them and say that that straight line represents the natural surface, you haven't got information enough.

[fol. 922] Q. Well, now, have you had any experience in excavation which leads you to the conclusion that those pits are not frequent enough to draw a deduction?

A Yes, I have had experience. I remember one very dramatic case in the case of the excavation of the New York Central Station in New York. They made a topographical map showing the surface——

Mr. Oviatt: I don't think this is proper, if your Honor please.

The Master: No, I don't think so at all.

Q. I don't ask you to state the occurrence; I asked you to say whether you have had such experiences?

A. Yes, I have had them, and that's why I say that you have no right to draw that line as showing the surface as that natural surface.

Q. So that your conclusion is based on experience in excavation?

A. Yes. I don't think that line is warranted, based on my own experience. Is that what you want to know?

Q. Now, you didn't take into consideration my entire question in answering that question. That cross-section is based upon the information as disclosed in these other exhibits of the cross-section of the separate trenches, with some of which you said you disagree. Now, I ask you whether that cross-section agrees with your observations?

A. No, sir. In looking at these other cross-sections I noted that I [fol. 923] placed this natural filled surface——

Q. That is, the elevation of the natural filled surface?

A. The elevation of the surface of the natural deposit is always higher than is shown on those cross-sections from which have been made this. Therefore my natural surface line, sketched in in a similiar manner, would be above this line as they show it.

The Master: About how much higher would it average?

Witness: As I recall it it ran from one to two feet.

Q. Well, it doesn't average. If you start at the south end, which is Pit number 34, for instance, how much higher would it be?

A. And what pit.

Q. Pit number 34?

A Well, I am 3.1 higher.

Q. That is, 3.1 foot higher? Is that what you mean by that?

A. Yes.

Q. Or three and one hundredth feet?

A. Well, as I remember it—may I see that 34? (Witness is shown number 34.) I am 2.1 higher.

Q. Now, what do you mean by that, 2.1 higher?

A. Two and one tenth feet.

Q. That is your conclusion of the elevation of the natural surface before any fill was made at Pit number 34, is 2.1 feet higher than is shown on this exhibit number 46?

A. Yes.

Q. Now, won't you please say it in that way so the layman will understand it. He has got it on that one.

A. Yes, I see.

[fol. 924] Q. In Pit number 33, how much higher than this exhibit do you make the elevation of the natural surface of the soil before the artificial fill was made?

A. As I recall the elevation that they place on Pit 33, they place the elevation of the natural surface at 247.5, and I placed it at 249.3.

Q. That is a difference of—that's a difference of 1.8, is it not?

A. Yes, 1.8 higher, I place it.

Q. Now, in Pit number 46, how much higher do you place it?

A. .7 higher on the average. They have a variable elevation, but averaging .7 higher.

Q. Well, now, do you consider it a reasonable engineering assumption that the condition between those Pits is the same as it is at the pits?

A. No, sir, I do not.

Q. Why not?

A. Well, you haven't got information enough. The experience shows that under conditions on a flat like that, and with a tendency to sand dune formation, and this stream having come down and cut it out more or less, that you are likely to have a very rapid and abrupt roll in the surface. It is quite different from taking it out on the Illinois prairies and drawing a straight line between prospect holes like that. You have got a bumpy condition of the natural surface that you cannot reproduce with so few prospect pits as you have here.

The Master: But, Mr. Knowlton, let me ask you this question:

If you assume the conditions beneath the surface to be the same be-[fol. 925] tween the pits on this cross-section D-D as was discovered by your examination of the conditions in the pits, then your line marking the top of the natural surface would still be higher than the line indicated on this exhibit, would it not?

A. Yes, sir.

Q. It would be how much higher on the south end?

A. Do you mean here (indicating on exhibit)?

Q. Yes.

A. I think I said that.

Q. About how far apart are those pits on that cross-section, approximately?

A. Well, 33 is not quite a 100—33 is about 70 feet from 34.

Q. You find similar distances between the other pits?

A. 33 is about 80 feet from 46; 46 is about 70 feet from 45.

Q. Now, did you find a number of buildings around on that property?

A. Yes, sir.

Q. Did you find some of these pits very close to buildings?

A. 45 or 46 was directly right up against the side of a building.

Q. Did you find conditions that indicated that various excavations had been made on that property from time to time for the laying of pipes and grading and otherwise?

A. Several pits showed pipes in them.

Q. (Question read by the stenographer.)

A. Yes, sir, as indicated by pipes. In Pits 30 and 31 by the broken condition of the material, occasionally a piece of timber.

Q. Now, what was the size in general of those pits that you examined?

[fol. 926] A. The size.

Q. Yes.

A. Oh, they were from 2½ to 3½ feet wide, and 6 or 7 feet long.

The Master: I think there are exact measurements in the record.

Q. Well, now, in those pits did you find any variation in the stratification of the soil between the different sides of the pits which would lead you to the conclusion that the surrounding surface without any fill on it was not level?

A. Yes. There were a few pits showed a very decided roll in the strata which indicates—which confirms what I have been saying about a country like that, the natural surface would roll and have little mounds on it. Some of these pits showed a roll of the strata even in the length of the pit,to say nothing about how——

Q. You say you found an abrupt row in 6 feet?

A. Well, hardly abrupt, but I think I remember one case of nearly a foot.

Q. In 6 feet?

A. Yes.

Q. Now, without going through the conditions that you found in all of the pits which you examined, I'm going to show you exhibit number 54, which purports to be a contour map showing the dividing surface between the natural and artificial filling. Will you look at that map? Have you examined all of the pits indicated on that map?

A. Yes sir.

[fol. 927] Q. Assuming the contents of those pits to be as found by the plaintiff's witnesses, in your opinion is that contour map a proper engineering deduction from such information?

A. No, decidedly not, because they have made deductions here which are very much less warranted than the same similar deductions in that exhibit, and that one over there.

Q. The cross-section exhibit?

A. Because there they have——

Q. (Interrupting.) You mean by that the cross-section exhibit?

A. The cross-section, whatever you call it.

Q. I want to get this in the record; it is a cross-section?

A. Whatever that exhibit is, that cross-section.

Q. Won't you please leave it that way?

A. You have been using the word cross-section on these things, and I would call that a longitudinal section.

Q. What I object to is your calling it "whatever it is."

A. On that cross-section they have drawn the line of the natural surface, based on observations of pits 100 feet a part. Here they have drawn a contour map based on cross-sections 500 feet apart in this case. Now, that's obviously absurd.

Mr. Oviatt: You mean from A-A to B-B?

Witness: From here to here.

Mr. Oviatt: Yes.

Q. There are pits in between, of course?

A. There are no pits in here, not that I see except 2 and 3.

Q. Well, there are pits 6 and 12 in between?

A. Yes, but here is a block of country that is 400 feet north and south and 500 or 600 feet east and west, through which they passed [fol. 928] seven contour lines with no justification at all in my opinion.

Q. Now, the similar characterization applies to the contour lines to the westward?

A. Yes, except that their cross-sections are a little closer together and the improper deduction, improper statement which is applied by these contours is not quite so glaring.

Q. Well, what value do you consider that contour map has?

A. None at all. For instance, looking at Pits 31, 30 and 32. They definitely put in contour lines on pits that show a disturbed country, that are of no value. Now, what right have they to draw a contour line based on those pits.

Q. Let's drop that for a moment and take up Pit number 25. Pit number 25 is located where?

A. That is the most westwardly pit of all that I found.

Q. That's over in what is known as Terry Park?

A. So I'm told.

Q. And outside of the premises in question?

A. A red fence was pointed out to me as the western limit of the premises in question, and this pit 25 was outside and to the west of that fence.

Q. Now, did you examine that pit?

A. Yes, sir.

Q. What did you find in it?

A. Well, for a depth of .8 of a foot it is lake sand deposited by wind; below that for a depth of 2 feet was lake sand deposited by water; then came .2 of a foot of a dark colored lake sand; and then .2 of a foot again of lake sand; then a tenth of a foot of vegetable [fol. 929] matter; and then lake sand from then on to the bottom of the pit.

Q. That is, the whole pit was lake sand, you found nothing but lake sand there?

A. The whole pit was lake sand except a little strip of vegetable matter.

Q. Oh, you mean the vegetable matter 2 or 3 feet down from the bottom?

A. Away down to the bottom.

Q. Well, how much lake sand on the top did you find had been disturbed?

A. It had not appearance of having been disturbed except as it was blown in there by the wind.

Q. Well, for how far down, I'm talking about?

A. That wind-blown depth was .8 of a foot, and so far as any artificial disturbance goes, there was none at all.

Q. And after you got down .8 of a foot, then what did you find the condition as to whether or not the sand had been laid there by water or had been blown there?

A. Well, it was water deposited and contained besides sand fairly large pieces of gravel which you wouldn't expect to find in a wind-blown material; further, there was very definite evidence by stratification of water deposit.

Q. At what elevation did you find the top of that water deposited sand?

A. 250.1.

Q. 250. 1?

A. 250.1.

Q. Now, was there anything in that pit to indicate that the level of the lake had ever been at 250.1?

A. No. On the contrary there was a slight roll to the southward of the water deposited strata from which I conclude that that was water deposited as the result of a storm or storms.

[fol. 930] Q. Now, what do you mean, what kind of a storm a rain storm?

A. No, a wind storm.

Q. Tell us what you mean, what you are getting at?

A. When a big surface is kicked up sometimes a bar will form or a bank will form of sand which is above the level of the lake.

Q. Form how, by the wind blowing it? Describe what you mean?

A. By the waves carrying the material up there.

Q. Well, have you watched the action of the waves in Lake Ontario?

A. Yes, sir.

Q. And what have you noticed the action of the waves to be with reference to carrying the sand?

A. Sometimes the waves will take it out, sometimes they will build it back well above the normal surface of the lake. In short, the elevation of the sand on the shore of the lake is not connected at all with the elevation of the lake. There is no indication of the level of the lake.

Q. Is there anything about the condition of the sand along the edge of the lake which indicates the level at which the lake water had ever been?

A. No, sir.

Q. Why not?

A. Why, the storms enter into it as a very large factor and disturb the sand both by taking it away and putting it back, building up, and the wind also. Both waves and wind build up dunes and banks above the level of the water in the lake.

[fol. 931] COLLOQUY BETWEEN MASTER AND COUNSEL

Mr. Sutherland: We have a gentleman from Buffalo here, an engineer, we would like to examine him now, because he wants to return this afternoon, and if we can defer the cross-examination of Mr. Knowlton for that purpose, it will only occupy a short time.

The Master: You have not yet finished your direct examination.

Mr. Moser: I will give way if you wish.

Mr. Sutherland: No, go ahead and finish your direct examination.

Mr. Moser: I was going to take up another branch of it anyway. I suggest that you put him on now.

WALDEMAR S. RICHMOND, witness produced by the defendants, being first duly sworn, examined by Mr. Sutherland, testified as follows:

Q. Where do you reside, Mr. Richmond?

A. In Buffalo, N. Y.

Q. What is your occupation?

A. I am a civil engineer.

Q. Where were you educated in your profession?

A. At the Massachusetts — of Technology.

Q. What class did you graduate with?

A. 1905.

Q. Since that time have you specialized in any line of engineering?

A. I have been continuously engaged in engineering work which [fol. 932] has been very largely of a hydraulic character since that time.

Q. Have you been employed by the United States Government in that capacity?

A. I have, yes.

Q. For how long a period?

A. A total period of about 14 years.

Q. You are now in the employ of the Government are you?

A. I am.

Q. But during this time that you have been employed have you given study to the water levels of Lake Ontario?

A. I have.

Q. How extensively have you studied the water conditions of Lake Ontario?

A. In connection with general studies of water level covering all the Great Lakes, which has occupied the major portion of my engagement with the Government. I have spent quite a little time in connection with studies of water levels of Lake Ontario.

Q. Have you made, yourself, measurements at any point along the shore of Lake Ontario or its adjacent waters?

A. I have.

Q. Where was that?

A. I have made topographic and hydrographic surveys near the mouth of the Niagara River and I have also done a considerable amount of work in surveying and operating water guages, observing water levels and measuring the flow in St. Lawrence River, the outflow of Lake Ontario, and other lakes besides Lake Ontario. I have worked upon all the Great Lakes for the Government and have measured the flow of all the outflowing streams except the Detroit River.

[fol. 933] Q. Mr. Richmond, I ask you as to the character of the bank of Lake Ontario with reference to its stability or changeability of vegetation line as it now exists. Is there any such thing as a defined vegetation line along the edge of Lake Ontario.

Mr. Oviatt: I object to that.

Mr. Sutherland: I will change the form of the question Your Honor.

Q. What observations have you made as to the character of the edges of Lake Ontario along the southern shore. What observations have you made?

A. I have observed the character of the shore at various places along the south shore of Lake Ontario, notably at several of the harbors, Port Dalhousie and east as far as Oswego.

Q. Do you know the character of the edge of the Lake in the vicinity of Charlotte at the mouth of the Genesee river?

A. I do.

Q. Speaking generally as to that locality, what do you say as to whether there is a vegetation line at the mouth of the Genesee river on the shore of the lake corresponding to the standing level of the water?

A. I would say that there is no definite vegetation line which corresponds to the standing level of the lake.

Q. For what reason? What are the physcial reasons which cause you to answer as you have?

A. The reasons are that the shore in that vicinity is composed largely of sand and finer gravel of what I would call a shifting nature. [fol. 934] And the water level of course varies considerably, being lower at times and higher at other times, making a combination of circumstances adverse to the maintenance of a vegetation shore line.

Q. Do you know the habit of sand formation along the shore of the lake in that vicinity?

A. I have observed the habit of sand formation on sand shores at various places along the Great Lakes.

Q. Is the sand that is thrown up by the lake in the form of a beach barren sand or is it sand out of which vegetation will naturally grow?

A. I would call it barren sand.

Q. What would be the effect of the waves in time of storm upon a line of vegetation at the fringe of the lake?

A. If the waves reached to the vegetation line I would say they would tend to be destructive of it.

Q. Do you know what the history of the bluff land along the edge of the lake along the south shore has been whether they have been worn away by the action of the waves or whether they stand stationary, where there is no rock?

A. The tendency in general has been for the shores to be worn away. Other places the shore has been built out as it appears.

Q. I am speaking now of where you have a high land or bluff along the edge of the water. What is the effect of the waves in time of storm upon this earth bluff?

A. It is erosive.

Q. Did you make a study, Mr. Richmond, of the tabulation put in evidence by the Commonwealth of Massachusetts, Plaintiff's ex- [fol. 9351] hibit 56?

A. I made a study of this exhibit which you hand me.

Q. And likewise did you make a study of the chart entitled "United States Lake survey, monthly mean water levels of the Great Lakes from official records 1860 to date"?

A. I am familiar with that chart.

Q. That comes down to what date?

The Master: What is the number of that exhibit?

Mr. Sutherland: We haven't got it on our copy.

Mr. Abbot: I think it is 55 Your Honor.

Q. Between what years does that chart which you hold in your hand, cover?

A. It covers the years 1860 to 1922, both inclusive.

Q. On Plaintiff's exhibit 55, have you made a calculation to determine the average elevation, the average monthly elevation shown through all that period of years, delineated on Exhibit 55 on Lake Ontario?

Mr. Oviatt: I object to that as absolutely incompetent and immaterial. There is no principle or theory applicable to this case, which will permit an average of lake levels over a period of years to determine any question involved. There is no principle of law by which testimony as to the average lake level from 1860 to 1922, the average highs or lows, is applicable to any question involved.

Mr. Sutherland: I am simply calling for a mathematical calcula- [fol. 9361] tion, whether it will be applied to the case or not, of course, will be afterwards determined. I am not asking the witness to say that it shall be applied. I am only asking him for a mathematical calculation.

The Master: We will let it in.

Q. Did you ascertain what the average of all the monthly levels delineated on that chart for Lake Ontario has been during the entire period covered by Exhibit 55?

A. I did.

Q. What is that average?

A. That average is 246.16.

Mr. Sutherland: Now, if for the purpose of this mathematical testimony, we can call that the mean average, we will know what each of us is talking about. Let me adopt that for a moment——

Mr. Oviatt: I object to that.

Mr. Sutherland: Then you give me something to use in place of it. I don't care what you call it.

Mr. Oviatt: I don't want any terminology to creep into this case which is going to confuse us in the argument, and the term "mean average," in connection with the term the witness has testified to, is going to confuse us.

Mr. Sutherland: Leave the average out. I want to know what we shall call this 246.16.

The Master: Ask the witness what he calls it.

Q. What do you call it Mr. Richmond?

A. The mean elevation of Lake Ontario as given by the Oswego guage for the period in question.

[fol. 937] Q. Now have you made a calculation of the average of all the months in which the water level of Lake Ontario was above that 246.16?

A. I have.

Q. What is the average of all the months for the whole 60 years in which months the level of the lake was above 246.16. I want to disregard everything except those months, except when the water was above 246.16. Add them together and divide them and see what the average is?

A. That average is 247.03.

Q. What do you call that 247.03?

A. I call that the mean or ordinary high water.

Q. Did you make a calculation of the average height of water for all the months during those 60 years during which the water was below 246.16?

A. I did, for the entire period of 63 years.

Q. What is the result which you obtained in that way?

A. The result so obtained is 245.33.

Q. Now, in that calculation have you included the water level for years subsequent to the years covered by the chart exhibit 55? You say 63 years, I thought the chart was a 60 year period.

A. The chart covers a period from 1860, to 1922, inclusive.

Q. Then instead of 60, we call it 63?

A. Yes.

The Master: Aren't you going to ask him what he calls this last average?

[fol. 938] Q. What do you call the last figures, 245.33?

A. I call that the mean or ordinary low water, but I wish to qualify that answer as well as the previous answer with regard to the ordinary high water by stating that a correction is necessary to be applied, that the figure given is the natural elevation before the correction has been applied.

Q. What is the necessity for correction, please explain that to us?

A. The water levels of Lake Ontario as shown by the Oswego guage have been artificially altered. They do not show exactly what the natural level would have been, and the chief causes of this alteration have been the diversion of water at Chicago through the sanitary canal and the building of a dam in the St. Lawrence river between Adams and Bellieu Islands.

Q. Which has the greater effect upon the level of Lake Ontario, the withdrawal through the Chicago drainage canal or the dam in the St. Lawrence river?

A. The effect to date, of the dam, in raising the water level has been greater than the effect to date of the withdrawal of water on lowering the water level.

Q. What percentage measured in inches or feet?

A. The average change which I have computed for the 23 years which covers the period since the opening of the drainage canal is five hundredths of an inch rise, that is, Lake Ontario is arti- [fol. 939] ficially influenced so as to be five hundredths of an inch higher than it would naturally have been. But for the drainage canal it would be higher than that. It has been raised. The drainage canal withdraws water from Lake Michigan and the dam in the St. Lawrence holds back water that otherwise would flow from Lake Ontario and one neutralizes the other, except that the net result of the two is five hundredths of a foot of an increase in the height of Lake Ontario.

The Master: Those corrections apply to the last 23 years you say?

A. The Chicago drainage canal began to divert water in 1900, the dam was constructed in September and October 1903.

The Master: So that for the last 20 years, there have been operating simultaneously those two influences?

A. Yes sir. There have been other lesser artificial disturbances, the chief of the lesser disturbances being the raising of the level while the north channel was being dredged in the river above the Bellieu rapids. In doing that work, a coffer dam was constructed. The maintenance of that coffer dam brought Lake Ontario up fifteen one hundredths of a foot higher during that time; after the work was completed in about 1900 the coffer dam was cut and the water flowed into the dredged channel which was an enlarged opening, and would have lowered the level of Lake Ontario except that a part of the coffer dam was left in position and a pier was constructed from this channel out into the river, which almost compensated for the lowering due to the cutting of the coffer dam.

[fol. 940] The Master: Making your deductions from this chart, you have corrections to take care of these extraneous or unusual circumstances, have your?

Mr. Sutherland: I was about to ask you that. The figures which you have, the average high, 247.03, the average 245.33, do not take into consideration this five hundredths of a foot correction, do they?

A. No sir.

Q. Mr. Beach requests me to use the word ordinary instead of average. What correction then do you wish to make now by reason of this difference that you have spoken about in your ordinary high that you put at 247.03. What would it be with that correction of five hundredths of a foot, taking that into account?

A. The ordinary high would be 246.98.

Q. The ordinary low would be what with the correction made?

A. 245.28.

Q. Now, Mr. Richmond, have you any data that you have studied prior to 1860 as to the levels of Lake Ontario?

A. I have.

Q. What are they?

A. That contained on exhibit No. 56.

Q. Do you wish to make any change in the new level of 246.16, that you gave by reason of this differential of five one hundredths of a foot?

A. My computation has been based on the use of the uncorrected figure 246.16, but a similar correction applies in order to obtain the true natural mean that would have obtained during those 63 years.

Q. And what would that be with that correction made?

A. 246.11.

[fol. 941] Q. Now to recur to the data before 1860, what have you in the way of records of the years before 1860?

A. This record taken from page 178 of the Report of the U. S. Deep Waterways Commission.

Q. What table is that?

A. This table on Plaintiff's exhibit No. 56.

Q. That shows measurements for what years prior to 1860?

A. For the years 1815 to 1827, inclusive, and from the years 1837 to 1859, inclusive.

Q. What were the earliest measurements? Where were they obtained and by whom?

A. The first group of measurements were observations taken in the Niagara River.

Q. By whom?

A. By some private individual, whose name I do not recall.

Q. Where did you get the information that these measurements were taken by a private individual in the Niagara River?

A. That information is contained in the report of the U. S. Deep Waterways Commission of 1897, of which this exhibit is a reproduction of one page.

Q. How frequently were those first series of observations taken, according to the information which you have?

A. They were single observations each time,—two being taken each year.

Q. Do you know at what time of the year they were taken? Does the report which you have referred to state at what time of the year those observations were taken?

[fol. 942] A. The month during which each was taken is shown on this table. I see no record and have seen no record of the date.

Q. What month is stated on Exhibit 56 for this level?

A. Some of them are in March, two in March, two in April, several in June, one in July, one in October, 1827.

Q. Now there came a time when there were no observations taken that are extant at the present time, is that so?

A. There was a period from 1828 to 1836, inclusive, such as you have mentioned.

Q. From 1836 to 1860 where are the data obtained from which that tabulation is made?

A. That data from 1837 to 1859, inclusive was obtained from several localities, principally from Port Dalhousie, as I now recall the statement in the report, and partly from Toronto, and partly from Oswego.

Q. Have you made calculations predicated upon the period 1837 to 1860?

A. 1837 to 1859, inclusive.

Q. You have made calculations predicated upon those years with reference to the three positions or objectives that you have referred to in your previous testimony?

A. Yes based upon the data in this table.

Q. What is the mathematical result in computing from 1837 until 1859, inclusive, as to your first figure?

Mr. Oviatt: I object to that upon the same ground. It is a mathematical calculation, having no relevancy to any question to be determined in this case.

The Master: I will let it in.

Q. The first figure you said was 246.16 on that exhibit 55?

[fol. 943] A. 246.16 was the natural mean for the years 1860 to 1922 inclusive. The corresponding mean computed for the years 1837 to 1859 inclusive is 246.33, that elevation being based on the zero elevation of the Oswego gauge of 244.12, rather than 244.21 as given in plaintiff's exhibit 56.

Q. Adopting the same basis for the two periods what would the calculation be, or haven't you done that?

A. I can give you that, within about one hundredth.

Q. That is near enough.

A. The general average, uncorrected, after the St. Lawrence dam and the Chicago drainage diversion, for the period 1837 to 1922 inclusive, would be approximately 246.22.

Q. 246.22 covers the period from 1837 to 1922, does it?

A. Yes.

Q. Will you give us separately what the natural mean, if that is your definition for it, was from 1837 to 1859 inclusive?

A. 246.33.

Q. What would be the average from 1837 to 1922 inclusive, with the corrections which you say should be made in the last twenty years?

A. The correction in that case would be approximately three hundredths for the full period.

Q. To be taken off?

A. To be taken off from 246.22, which would leave 246.19.

Q. Now coming to the second standard which you used in your first computation which we have been calling the ordinary high, what was the similar computation for the period of 1837 to 1859? [fol. 944] A. I find I haven't computed that.

Q. Have you computed the average, the ordinary high for the entire period, 1837 to 1922 inclusive?

A. No I have not.

Q. What calculation have you made, if any, with reference to the ordinary low, which, without the correction, you computed for the period 1860 to 1922, at 245.33? Have you covered the entire period from 1837 to 1922 inclusive, with reference to that last standard?

A. I have not, directly. I have computed the corresponding figure for the years 1837 to 1859 inclusive.

Q. What would that be?

A. That is 245.42. From those I can compute approximately the mean for the entire period of 1837 to 1922, inclusive.

Q. About what would that be?

A. 245.36.

Q. Now does that take into account the correction factor of five hundredths for the last twenty years?

A. No, it does not.

Q. What correction would that correction factor make in the figure 245.36?

A. That would reduce the level three hundredths, making it 245.33.

Q. In making these estimates have you included the first series of figures that you say were made by some unknown person twice a year at the mouth of the Niagara River?

A. No.

Q. If you took those figures into your calculation, what would be their effect as to raising or lowering those averages which you have [fol. 945] spoken of?

Mr. Oviatt: I object to that. If the Court will examine the document, he will see that the date which is being incorporated into the average is fragmentary, so that such average is not only incompetent, but absolutely misleading.

Mr. Sutherland: The witness has not assumed, and we have not assumed that there is any great importance to be attached to that first series of figures, that were taken by John Doe, twice a year, and they are not complete enough to justify any general conclusion from them at all. I have merely asked the witness this question so that the rhetorical question shall not be put to us, Why did you ignore these figures in making up your calculations? We are willing to leave them out if the counsel desires to leave them out.

The Master: I think with that explanation with the extent of their value they would not do any harm in going in.

Q. What effect would those figures have? Would it raise the general averages or would it lower them?

A. They would lower the averages.

Q. How much?

Mr. Oviatt: I object to that.

Mr. Sutherland: Well, we will not ask the witness how much it will lower them.

Q. Was there any connection with the international commission, [fol. 946] and the boundary commission,—what was the name of that commission?

A. The International Joint Commission.

Q. Between Canada and the United States?

A. Yes.

Q. Was there any calculation by that commission of an ordinary mean or natural mean level of Lake Ontario for the period from 1860 on for sixty years?

Mr. Oviatt: I object to that. He is now calling for a computation made by some person not a witness.

Mr. Sutherland: I am asking him whether they did or did not do it. I want to show that this commission made a calculation of the average height*h* of the water of all the Great Lakes, for the sixty-year period, and averaged the height*h* of the water, the mean height*h* of the water, the ordinary height*h* of the sater, the natural level of the water, whatever it may be called, that they made a calculation covering the sixty years and put it in the report.

The Master: Do you expect to put that in evidence?

Mr. Sutherland: We would like to, yes.

Mr. Oviatt: I would like to say a word on that subject. We are all sufficiently familiar with proceedings between Canada and the United States to know that that is a commission which has to do with the volume of water. Now counsel and the witness, when they are discussing mathematical averages between high and low, they are taking a foreign element into that; they are getting into something [fol. 947] which has to do with the volume of the water. In this case we have no concern with how many gallons of water there are in Lake Ontario but we have a great deal of concern with reference to what is taken and legally defined to be high water mark. That has no relationship to any mathematical calculation of averages whatsoever, absolutely none. These mathematical averages may or may not have to do with the water going into the St. Lawrence, or the quantity which is available for power, etc., but they have no relationship to the shore line, either mean average, high or low.

Mr. Sutherland: I will waive the question.

The Master: I have indicated that the calculations made by this Commission may go in if you want to put them in.

Mr. Sutherland: Very well.

Q. Have you got that report here ? What is that average for Lake Ontario that they computed?

The Master: I don't think I would prove it that way, Judge.

Mr. Sutherland: We can put it in after the cross-examination. Let him go on with the cross-examination.

The Master: Let me ask a question or two, Mr. Oviatt, if I may?

Mr. Oviatt: Certainly.

[fol. 948] By the Master:

Q. Mr. Richmond, I understand that you have reached a figure 245.33, which you call the mean or low water, ordinary low water, running over this period of sixty-three years. That is correct?

A. Yes.

Q. And you ascertained that, as I understand by getting the average elevation of the lake below 246.16, running over that period, is that correct?

A. That is correct. I actually took the table of monthly averages and selected therefrom all those which fell below 246.16, and averaged them.

Q. Might you not reach the same figure, 245.33 if you took the highest elevation of the lake just below 246.16 that the lake might be at in any one moment of time during the sixty-three years, and then took the lowest that it might be at at any one moment during the sixty-three years and split the difference between them? You would reach that point, 245.33, although the water might not have been at that level at any time in sixty years, is that true?

A. I don't think so, Your Honor.

Q. Wouldn't you, if you took the highest figure just below 246.16 at any one moment of time, at any time during the sixty-three years, and the lowest figure, and split the difference between them, would have the average, wouldn't you?

A. The average of the two figures, yes.

Q. And might not that average be an elevation at which the lake in fact never rose or fell at all?

A. Not accidentally; that would coincide with any other mean.

[fol. 949] Q. In other words, do you have an average of ordinary low water if you do not take into consideration the length of time at which the water stayed at that level? Have you done that in this calculation? I just want to understand it?

Mr. Sutherland: He has taken every month, Your Honor. You can take every day, if it will make it any more certain, you can take it every day in the sixty years, so far as it is delineated in that chart, but he has taken every monthly average during the sixty years during which that fell below his median line, not taking some date when it got down below the lowest level, but showing what the history of the water was when it was below the median line; taking into account the length of time, the number of months it stood somewhere near those positions; you have got to take time into account to get an average. It all works out the same thing. Taking the monthly average, it seemed to be fair to get at an approximation, a mathematical approximation. But if you show that the water was almost up to the median line nine-tenths of the time and one-tenth of the time way down below, adding the two together and dividing by two, wouldn't be a fair result; so you have got to take all the months for sixty years that it was below the median line, in order to be fair.

Mr. Beach: If you took the two figures that you mentioned and added them together and divided them by two, the result might be startling. I have done it here. He can do it in a second. I would suggest that your Honor ask him to do that, then you can see how it would compare with this other figure.

[fol. 950] Cross-examination.

By Mr. Oviatt:

Q. How much mathematical education have you had?

A. In the Massachusetts Institute of Technology, I pursued the regular courses prescribed in the Civil Engineering Department, which included the differential calculus; and since that time, since graduating from the Boston Tech, I have studied a great deal, considerable of my study being on mathematical matters.

Q. Isn't it one of the elementary principles of mathematic that it is absolutely impossible to take an average of averages and get any result whatever?

A. I don't think so.

Q. That is so, isn't it?

A. No sir.

Q. In statistical work isn't it recognized that in order to get an average of anything, you have got to get original data, and that the average of averages does not mean anything, with reference to the original data?

A. My experience is just the opposite. I have handled a very large proportion of the computations for the United States Government in these matters during the last fourteen years.

Q. Will you take a pencil and paper, Mr. Witness. Take the figures 2, 3, and 4. The average is three, isn't it?

A. Yes sir.

Q. Take the figures 10, 11 and 12, 13, 14, 15, 16, 17, 18, 19 and 20, and the average is what?

A. Fifteen.

[fol. 951] Q. Take the figures 1000, and 1001, and the average is what?

A. 1000.5.

Q. Now you have 3, you have 15, and you have 1000.5?

A. Yes.

Q. Now give me the average of those three averages?

A. 722.

Q. Oh, no. Take the figure 3, which is one average, take the figure 15, which is another average, and the figure 1000.5, which is another average, and you get a total of 1018?

A. Oh, you want the average of *thr* three figures?

Q. The first figure you gave us was the average 1000.5, and from 10 to 20, and from 3 to 5?

A. Yes, I can give you the average of those figures, if that is what you wish.

Q. Give me the average of the three averages.

A. The average of those three figures I make 339.5.

Q. So that the average of your averages on the data is 339.5 and the average of the original figures, averaged together is seven hundred and something, isn't it?

A. Yes that is the weighted average.

Q. So that the average of the date that I gave you is seven hundred and something, and the average of the averages is three hundred and something, am I not right?

A. The answers I have given I believe to be correct for the problem you gave me.

[fol. 952] Q. The average of the original data, the figures amount to seven hundred and something over?

A. Yes, the weighted average, the true average.

Q. And your average of the averages is three hundred and something?

A. Which has nothing to do with the true averages.

Q. Just answer my question?

A. You are correct.

Q. Now the chart which you have used here is a chart which begins with the average monthly elevations, does it not?

A. Yes sir.

Q. In making your average the date which you call your ordinary mean and high is based upon data upon this chart which are themselves averages, aren't they?

A. I used the monthly means in arriving at my average, and I believe I so stated.

Q. All the data that you used was taken from this chart, was it not, so far as this period is concerned?

A. It was taken from a table which gives the same values as are there plotted.

Q. In figuring your average below mean 246.16, you are taking a period of time which bears no relationship to the levels of the lake when they were above 246.16, am I right?

A. May I have that again.

Question read by the stenographer.

Q. The period of time represented by the data showing the levels [fol. 953] below 246.16 has no relationship in any way to the period of time represented by the data showing the levels above 246.16, am I right?

A. I don't know what you mean by relationship.

Q. I mean equal.

A. They are not the same number of monthly means, necessarily.

Q. In other words, your average computed of the data below 246.16 might represent a period of time, only a fractional part, or greater than the period of time that the levels were above 246.16?

A. It might be different, yes.

Q. It would affect the entire proposition, wouldn't it?

A. To some extent. As a matter of fact, the lake is below the mean just about as much, and about to the same extent that it is above.

Q. Where do you get that data?

A. Right on the chart before you.

Q. Can you tell me by looking at that chart, taking the line 246.16, that the time during which the line is below 246.16 is equivalent to the time during which it is above 246.16?

A. I do not say it is equivalent, but I say there is no great difference.

Q. My question was if there is any necessary mathematical relationship between them, can you tell?

A. I don't know what you mean by that question.

Q. Much of your original data consists of the monthly mean, does it not?

[fol. 954] A. Yes.

Q. And the number of those monthly means below 246.16 is not necessarily equal to, greater or less than the number of those data below that mean, are they?

A. It is not necessarily equal, but in this case it is not very different.

Q. Have you calculated that?

A. No.

Q. The difference between the number of those data represents the difference in the period of time during which the lake is either above or below 246.16?

A That is correct.

Q. I think you testified to the fact that the sand along the lake shore is what we call barren sand?

A. I did.

Q. Do you from your experience advance the opinion that the lake waters have no effect upon vegetation at all?

A. No.

Q. Do you know as a matter of fact that vegetation does grow in these barren sands, when the vegetation is allowed to grow, so far as lake action is concerned?

A. I have seen some vegetation in the high spots between the shore and the dry land, notably on Lake Michigan.

Q. And you have seen vegetation upon the beaches east of here, haven't you, along Pultneyville, along the beaches formed east of Pultneyville?

A. I don't recall any, located as you indicate.

Q Do you remember the bars down at Sodus Bay, between Charles Point and the mainland?

A. I haven't been there.

Q. Are you familiar with the fact that all character of vegetation has sprung up naturally all along that bar during the last [fol. 955] few years?

A. No, I am not familiar with that.

Q. Well, you would say, wouldn't you, that vegetation could grow and does grow in lake sand, if it is let alone?

A. I think that would depend on the location. I do not recall any now at the foot of Lake Huron, for instance, I don't remember seeing any, along the beach there.

Q And there may not be any in the Arizona Desert, but I am talking about lake sand on Lake Ontario, and ask you in all fairness

if you have not discovered that wherever the lake sand is not interfered with by the waters, the vegetation will spring up upon it?

A. No.

Q. You are familiar with the character of the grass that grows in barren sands, are you not?

A. No sir.

Q. If vegetation were to spring up along any beach or lake shore, would the effect of the water of the lake,—would there be any effect of the water of the lake upon it? In other words, the vegetation would be affected by the heighth of the lake and by the storms which existed upon it?

A. Yes, to some extent.

Q. So that there would be a discernable effect upon the vegetation of the south shore of the lake, due to the action of the water?

A. Under the conditions you indicate, I assume so.

Q. Assuming first that there is some vegetation, wouldn't that vegetation be affected by the waters of the lake which worked upon it?

A. I think so.

[fol. 956] Q. So that if you were familiar with the effect of that sort of water upon that sort of vegetation, you could tell the extent to which the vegetation had been affected by the water, couldn't you?

A. I wouldn't want to say in any general case that I could tell.

Q. Isn't it true that along the sea shore, along any beach, or lake, or any pond, or river, that the vegetation is affected by the rise and fall of the waters?

A. Yes.

Q. And Lake Ontario is no exception to that general rule, is it?

A. I don't think so.

Q. So that in all bodies of water, including Lake Ontario, the waters affect the vegetation along the shore?

A. That proposition seems correct to me.

Q. It is characteristic, is it not, on the south shore of Lake Ontario, that beaches exist in different places?

A. Yes.

Q. Now, you have talked about there being an effect of the Chicago Drainage Canal, and of the dam in the St. Lawrence, and that the net result of that effect is to raise the level of the waters of Lake Ontario five hundredths of an inch, am I right?

A. With reference to the total period of time, 1860 down to 1922, both inclusive, from the time from which those effects have been felt at all they are larger, and the difference is larger.

Q. When was the dam built? I think you said in 1902?

A. 1903.

Q. And the drainage canal was built in 1900?

A. It began diverting water from Lake Michigan in 1900.

[fol. 957] Q. You took some data indicating the effect of those two elements during the last twenty to twenty-two years, and then you applied it to a period going back to 1860?

A. I determined the effect for the period over which it has existed by a calculation which I made, and then I applied the correction,

on the basis of making a weighted average, for the total period of 63 years.

Q. You mean you are getting at some figure by which the lake ought to have had a different level before 1900, if the dam and canal had existed?

A. What I mean is this——

Q. Answer that question. I would like to get that question answered.

Question read by the stenographer.

A. I don't comprehend that question.

Q. Maybe it is my understanding. I don't understand why you apply some figure to past lake levels before either the dam or the canal existed in order to correct the lake level as it is actually shown on the chart. Explain that to me and that will answer the question.

A. The net effect of those two artificial interferences have been to hold Lake Ontario up higher than it would naturally have been during the last twenty years Therefore, if I had taken an average of water levels which might have been recorded had these two improvements never been constructed I would have arrived at a lower elevation than I have arrived at, taking water levels which were read during the last twenty years under the influence of those two works. [fol. 958] Q. You have taken the actual date from 1860 or thereabouts to 1900 or thereabouts, and then you have taken figures as to the effect of the dam and the drainage canal, and applied those figures to the data which are recorded concerning the levels of the lake from 1860 to 1900, have you not?

A. I have applied them to the average, not to the individual.

Q. You have taken an average based upon previously recorded data from 1860 to 1900, and then you have corrected your averages based upon this positive data by the application of the figure which you say represents the effect of the drainage canal and the dam, is that right?

A. That is correct with the exception that the correction which I actually computed for the last twenty years was eighteen hundredths of a foot. The lake has averaged for twenty years eighteen hundredths of a foot higher than it would have averaged had we not had those two works, and weighted them to cover the entire period of sixty-three years, thereby reducing the correction of the mean for the entire period to five hundredths.

Q. So that you have taken data from 1860 to 1920, which is data of averages, to get that result you have deducted from that average what you call a weighted average of the effect of the last twenty years of the canal and the dam?

A. Yes.

By the Master:

Q. You have been spreading eighteen hundredths of a foot over the sixty three years?

A. I have, in this way.

Q. In doing so you have reached the proper figures spread over, [fol. 959] and that figure was five hundredths?

A. Yes.

Q. So that you reduce your 247.03 on the high water to 246.98? That would be the net result, wouldn't it?

A. Yes, and then I also reduced it still further by three hundredths, as I testified to here, so as to cover the entire period from 1837 to 1922. The average for the period I corrected by an amount of three hundredths.

Q. That is to say, if you began earlier than 1860 or whatever date it was, if you began in 1830, you would have lower water during the earlier period and that would make the average lower?

A. The weight of the effect of the actual increase in elevation which existed for twenty years becomes less and less as it is applied to a longer and longer period of years in which it was not actually below.

[fol. 960] By Mr. Oviatt:

Q. Now, in the last twenty years you have assumed or you have calculated, I don't want to imply anything by the use of the word assumed, that the lake is higher than it would have been without the combined effect of the Chicago drainage canal and the dam, am I right there?

A. Yes, sir.

Q. And so as to place your figures where you believe they should be, where the lake would be without the effect of those two elements, you have used a computation to deduct from your general results as to the actual data of the actual lake levels?

A. That's correct.

Q. Now, you do find, do you not, that in years before the dam and the drainage canal were in that the lake actually rose to higher levels than it has ever been since the dam and drainage canal have been constructed, do you not?

A. The highest water was in 1870.

Q. So that before this dam and the drainage canal were erected we had higher water than we have had since the canal and dam have been constructed?

A. In that one instance and possibly one or two others.

Q. Well, for instance, in 1911, with the dam and drainage canal in existence, you had lower water than you had in any year since 1860 with about two exceptions, did you not?

A. Lower water?

Q. Yes, am I right?

A. Yes, as I understand your question.

[fol. 961] Q. And before the dam and canal were constructed you had higher water in some instances than you have ever had since; am I right?

A. That is correct.

Q. And yet, with those facts before you, you have considered that the period from 1900 to 1922 represents a situation which

requires a deduction from all previous data in order to ascertain a true average of the whole period?

A. I have.

Mr. Oviatt: That's all.

By Mr. Sutherland:

Q. Mr. Richmond, by what method, or on what basis have you determined that the effect of the dam in the St. Lawrence River more than compensates for the loss due to the withdrawal of water from Lake Michigan by the Chicago Sanitary Canal?

A. I compute each effect separately for each year since the causes have been in existence.

Q What data had you to make that computation?

A. The data involved are the monthly mean elevations of the water levels of Lake Ontario, the discharge equations for the St. Lawrence River for the period before the building of the dam and since the building of that dam; the approximate quantities of water diverted by the sanitary district of Chicago in the drainage canal; together with certain corrections to that data which I myself obtained through the government several years ago.

Q. Is there a consensus of opinion among engineers who have studied the subject as to whether the effect of the dam in the St. [fol. 962] Lawrence more than offsets the withdrawal of water from Lake Michigan?

Mr. Oviatt: I object to that as immaterial. He can't introduce the opinion of other experts any more than you can introduce the contents of a textbook through this witness.

The Master: Why can't you introduce a textbook in evidence?

Mr. Oviatt: You take a scientific treatise, you can't introduce that as the opinion or as evidence.

The Master: No.

Mr. Oviatt: Now, this witness is being asked what the opinion of others is. He says, "Is there a consensus of opinion among experts that a certain fact exists?" In other words, this witness is compelled to say that the whole scientific world has an opinion.

Q. Has the subject been discussed, Mr. Richmond, among engineers, as to the effect of the dam in the St. Lawrence River as compared with the withdrawal of water by the Chicago Canal?

Mr. Oviatt: I object to that as entirely immaterial,—the discussions of other people.

The Master: I think he may answer whether or not it has been discussed. It is interesting.

A. I have discussed it with other engineers who understand that subject.

Q. Has that been a subject of consideration by the government?

A. It has.

[fol. 963] The Master: Have you made a report on it for the government?

Witness: Not on that particular phase, your Honor, but I have made several reports to the government in regard to the hydraulics in the St. Lawrence River in general; in fact, I made the major portion of the measurements of flow there myself for the government, and I have made corresponding reports in regard to other rivers, and also including some matters with reference to the drainage canal.

Q. Are you familiar with the effect of windblown sand upon vegetation?

A. I have observed notably along the east shore of Lake Michigan, that the sand has been blown into dunes and has gone among the trees of the forest and among the grasses along the beach.

Q. Let me read to you an extract from the testimony of General Abbott. I read from page 455. "Sand was blowing and the windblown sand was coming up on the ground and the grass came up through to avoid the interference of this windblown sand which always occurs along the water's edge on the lake shore. I had recourse to the river." Do you agree with his statement that there is always an interference with vegetation along the edge of the lake shore by windblown sand?

Mr. Oviatt: Just a minute. I object to that as clearly the wrong method, one expert witness can't be asked if he agrees with the other. This gentleman is here to state his opinion, not his disagreements.

[fol. 964] The Master: Oh, I think we will make time by proceeding. Go ahead, he may answer.

Q. (Question read).

A. Where we have that character of shore and sand I believe there is such an effect.

By Mr. Beach:

Q. I want you to state on the record what is the extraordinary low water mark, and the year, as shown by the chart, exhibit 55.

Mr. Oviatt: Now, in the interest of time—these gentlemen on the other side have examined witness after witness and I have, to conserve time, and which has really been wasting time, refrained from objecting. What is the purpose of asking a witness what a diagram shows where the low level of the water is, and I object to it upon the ground that it is wasting time.

The Master: I think we save time by putting it in rather than discussing it.

A. The lowest plotted point on the Lake Ontario diagram occurs in the year 1895 in the month of November, and scales approximately 243.40.

Mr. Sutherland: Your Honor, we will ask the witness, after he leaves the stand, to examine these charts to see whether the water was above the mean level or below the mean level the greater number of

months. That question was asked here and he wasn't sure about it. We will let him leave the stand and make that calculation now. [fol. 965] The Master: All right.

THEODORE E. KNOWLTON was thereupon recalled to the stand and testified as follows:

Cross-examination.

By Mr. Oviatt:

Q. Mr. Knowlton, you have spoken about the clay carried down by this creek. Where was the mouth of the creek?

A. I don't know where the mouth was specific-ly. It would have been somewhere on that flat and would change its location during its entry.

Q. And where, in your opinion, was this clay laid down in the creek or in the lake?

A. It laid the first point where the surface of the ground was flat enough to permit the water of the creek to spread out, to lose its velocity sufficient to drop its load of solid matter.

Q. And that is in conjunction with the edge of the lake?

A. It might be inland or anywhere where that flatness occurs.

Q. And you haven't any idea from the examination of these pits as to whether or not this clay was laid down inland or on the shore of the lake?

A. It might be laid down either or both.

Q. And has your examination of those pits in that locality, and the locality generally, led you to any opinion as to where the creek's mouth was?

A. No, sir.

Q. None at all?

A. None at all except somewhere on that flat.

[fol. 966] Q. And it would have to be laid down in very quiet water?

A. No. As soon as the velocity of the stream slacks sufficiently to drop the load, and that velocity will vary with the kinds of load it is carrying.

Q. Yes.

A. That is where it will drop its load.

Q. And the clay which is brought down by a stream is in a very finely divided state, is it not?

A. Yes, sir.

Q. It is the material that makes waters appear muddy to the casual observer?

A. One of the materials.

Q. And materials as finely divided as that are only dropped where the waters have scarcely any motion at all?

A. I couldn't say that. That depends entirely upon the nature of the material, the shape and surface of each particle, and the density.

Q. Yes. And I am asking you now with reference to this very material which you examined and found to be clay,—that material?

A. And what is the question?

Q. Whether the velocity of the water would not have to become so slight as to make the water practically motionless before that was permitted to be laid down?

A. No. The velocity could vary with its depth.

Q. The water would have to be approximately at lake level there in that locality, wouldn't it?

A. No, sir.

Q. It wouldn't? That is, the water could be high enough so it could be above lake level and yet the stream slow enough to drop the clay?

A. And thin enough.

[fol. 967] Q. And thin enough?

A. And thin enough, yes.

Q. The stream itself thin enough?

A. Yes, in depth.

Q. Now, what did you find to be the greatest elevation at which the top of the clay appeared in any of these pits?

A. I would have to refer to my notes.

Q. Can you do so readily, please?

A. Yes, sir. (Witness produces his notes and refers to them.) It will take a minute to work this out. 250.7.

Q. And that was in pit what number?

A. Number 8.

Q. And so in the locality indicated by Pit Number 8 the water was somewhat higher than 250.7 when the clay was laid down?

A. Yes, sir.

Q. Now, outside of Pit 8, beyond it and to the north, and I think in Pit 29, you found no clay at all; am I right?

A. Correct, yes, sir.

Q. Well, now, did that mean anything to you, that you found clay further south and no clay further north?

A. No, nothing particular.

Q. In Pit 29, you found nothing but sand at the elevations which in Pit 8 you found clay; am I right?

A. I find miscellaneous mixture at the same level in Pit 21 as found on top of the clay in Pit 8.

Q. Do you find sand in Pit 29, lake sand?

A. Yes, sir.

Q. Throughout any elevation in which in Pit 8 you find clay?

A. I find lake sand throughout the same zone of elevations in Number 29 as I found clay in Number 8, confining that comment to a point not greater than 3.4 feet below the surface.

[fol. 968] Not lower than that?

A. That reply does not go deeper than that.

Q. Now, in Pit 8 you do find sand laid down by the lake below the clay, do you not?

A. Yes, sir.

Q. And the clay immediately on top of it?

A. A thin layer of vegetable matter on top of it.

Q. And then the clay?

A. And then the clay.

Q. And how thick is the thin layer of vegetable matter?

A. About .1 of a foot.

Q. So that the lake was laying up sand in the locality of Pit 8 before the creek was carrying down clay?

A. Before the creek was carrying down the particular body of clay which I am talking about.

Q. Yes. You take in the connection and mouths of creeks generally, and not confining your testimony now to this specific locality, the clay and finely divided materials are carried out beyond the surface agitation to a point where the water is so deep as to cause a loss of motion to the current, and it is there in the deep waters that the clay and other finely divided materials are dropped; is that true?

A. Dropped at any point where the velocity slacks down sufficient to permit it.

Q. Now, entirely aside from the question of velocity, and taking the question of surface agitation, you take in the mouth of a river emptying into a lake and you find that the surface is almost continuously agitated to such an extent that the clay is carried out to [fol. 969] the deeper waters; is that not true?

A. Not necessarily. The clay might be sufficiently deep in the water to be unaffected by the surface agitation.

Q. That is what I say. So that you've got to have the clay in water sufficiently deep to be undisturbed by surface agitation before it would be dropped to the bottom; am I right?

A. Not necessarily. A very thin film of water would carry clay and drop it.

Q. Well, a thin film of water in motion to carry the clay wouldn't drop it, would it? You would have your whole water moving, wouldn't you?

A. As the fi-m of water became thinner and thinner and slacked up it would drop the material.

Q. Now, you are assuming it becomes thinner and thinner until it practically stops, aren't you?

A. Until it gets to a point where the material is dropped.

Q. In other words, slowing up all the time?

A. When it flowed down to a certain point it would drop its load.

Q. Now, you take the mouth of a river, the farther out you go the less the current is?

A. When the river is running into the lake?

Q. Yes, that is what I mean.

A. Yes.

Q. So that most of the clay is dropped where the current is least perceptible; am I right?

A. Yes, but we are not talking about a river. I am talking about a stream coming down on a flat.

[fol. 970] Q. You don't know anything about the locality of this creek, do you?

A. No. I simply know the topography of that section and what is natural to infer would happen.

Q. But you haven't attempted to locate the channel of the creek so far as the territory north of Beach Avenue is concerned?

A. Geographically, no, sir.

Q. And you don't know anything about the direction of the creek or its location or the width of its valley?

A. No. And neither do I know the water I am talking about could be not only in the creek but over the bank outside of any creek channel.

Q. I don't think I follow that?

A. If you have a well defined creek channel you might also, in times of excessive flood waters or excessive precipitation, have very definite stream flow or sheets of water outside of the regular creek.

Q. Now, you take a creek opening into a lake, at the border of the lake, and you have at the edge of the lake such an agitation of the surface water as would refuse to permit that creek to drop any clay along the shore of the lake, haven't you?

A. The surface agitation of the lake does not—is not directly related to current flow because a vary heavy surf, for instance, the particles of water—a particle of water will make an oval path or an up and down path and not flow so as to constitute a current.

[fol. 971] Q. And then spreads out?

A. And spreads out.

Q. And spreads out in seeking its outlet into the lake?

A. In seeking its outlet to a lower level somewhere.

Q. You don't get very much of a spread if the stream is dropping continuously, do you?

A. It may not. The water that's carrying the material may not be in the stream, the normal summer stream bed at all. It may be over the banks.

Q. That's in freshet times?

A. Whenever there is an excess of water.

Q. Now, that water coming down in excess is coming down with a motion that wouldn't permit it to drop the clay; isn't that true?

A. The minute it gets on the flat it spreads out and loses motion.

Q. And in order to get on the flat it has got to get down to a level which is more nearly the level of the body of water into which it is opening; isn't that true?

A. No.

Q. It is not true?

A. No. It can be well over the bank, maybe over a little, flooded over the bank and into a lower spot there.

Q. Well, then, you think that in this locality there was an obstruction to the north and a rising of the ground reducing the thickness of the film of water?

A. I don't know what happened there; I simply know that there is a flat and the topography is such that when the water comes down off the highland it would go almost anywhere. I don't know the exact contour of the original surface.

[fol. 972] Q. We are not talking about the same thing. What I mean is in order to get your clay dropped to the bottom you have got to have clear water without this surface agitation or surf, and the existence of surf makes it impossible for any creek opening into that surf to drop its clay?

A. The surface agitation on a film of water the kind I am talking about is so slight you couldn't measure it with a micrometer. You can't pick up any surf on a sheet of water a sixteenth of an inch thick.

Q. I know. I am talking about if the creek opens into the lake itself or the shore of the lake, you can't have any deposit of clay along the edge of the lake.

A. Yes, you might.

Q. You might?

A. Yes.

Q. Do you know of any locality in this neighborhood or down here at Charlotte or Sea Breeze, where there is any indication upon the beach or sand of any clay at all?

A. It would not stay there.

Q. Why not?

A. Why, the storms would come up and move it around and it would gradually, by diffusion, work out into the body of the lake.

Q. And what would cause that?

A. You take any finely divided matter, and particularly a clay, it gets into what is known as—I have forgotten the technical name—its acts almost like liquid itself. It gets into a caloid form and hardly will settle; in fact, sometimes it will not settle but the [fol. 973] heavier particles will settle so that you have everything from a particle so fine it acts like a liquid back to a heavy chunk that won't move at all, hardly.

Q. Did you find any particle, heavy, light, or otherwise, anywhere along on any beach on the south shore of Lake Ontario, consisting of clay, either where a creek opens into it, a river opens into it, or any other body of water?

A. Yes, I believe you can find clay on the shore of Lake Ontario.

Q. On a beach?

A. Well, what do you mean by beach?

Q. A sand beach such as existed——

A. Not a sand beach, no.

Q. Where you have a sand beach, a river or creek opening into it, you find no clay, even though the clay is brought down by the creek, do you?

A. Well, you are asking for a very general question which may call for a valueless general answer.

Q. No, I don't intend to do that. I want to confine myself to this thought entirely, Mr. Knowlton, that where you have a sand beach on the shore of a lake such as Lake Ontario, that the natural surface agitation and the storms prohibit the thought or the possibility of clay being deposited along a beach because of the fact that the surface agitation requires that that clay shall be carried farther out into the still water?

A. Well, I am quite willing to say that in my judgment that you will find less clay in the regular narrow stream body than you will in the adjacent shores when the adjacent shores constitute a flat surface.

[fol. 974] Q. Do you find any vestige of clay along any of the beach- in any of this disputed territory, or west along into Terry Park?

A. Well, there is one pit here——

Q. No, no, I don't mean in the pit; I mean along the shore?

A. No, none.

Q. The action of the water and the waves on the shore, in such a case as a beach as this, is to throw up the heavier particles and withdraw the finer particles; is that not true?

A. No.

Q. You take the stuff that is washed up by the storm, doesn't the storm leave above its level, above the level of the lake, the heavier particles which it throws out from the film of water, taking back with the water the finer part?

A. Not necessarily.

Q. That's the usual thing, isn't it?

A. Not necessarily.

Q. Well, the idea of necessity is not implied in the idea of the usual, Mr. Knowlton?

A. You can have finer particles caught in a mass of coarser stuff.

Q. Oh, yes, but the coarser stuff is what holds the finer stuff?

A. Yœ, but the finer stuff would be there.

Q. By reason of the coarser stuff being there to hold it?

A. It would be there for various reasons. Possibly a wave formation may come in and leave it, happen to be just so it would leave finer stuff.

Q. That's because the coarser stuff was there first?

A. Not necessarily.

[fol. 975] Q. What is it usually?

A. You are getting into very highly technical stuff.

Q. Of course, there is a great deal of this case depends upon generally recognized principles of wave and water action. I am asking you if that is not the usual thing, that a storm or a surface agitation throws up the heavier particles, if the force is sufficient to throw up anything, because the heavier particles are thrown beyond the water by the momentum gathered in the motion of the water, and that the water receding in a wave or otherwise carries back the finer particle which has not got enough momentum or mass to be discharged from the surface of the water?

A. So far as the surface indication looks it would look that way, but if you dig down a little ways you will find caught in those larger pieces the finer stuff which may not have necessarily come with them but have come afterwards.

Q. In a different character of storm?

A. In other words, the coarser or top surface might act as kind of a sieve to hold this stuff back, when without the coarser top surface it would have gone away.

Q. You found some clay in Pit 43 which you said was artificial fill, did you not?

A. Yes, sir.

Q. And was there any difference in texture—I am not speaking of lamination now—any difference in texture or quality of material between that clay and the clay that you found in the other pits which you characterize as natural formation?

[fol. 976] A. Well, it had a different appearance and it had a foreign matter in it.

Q. Any difference in the texture of the clay itself?

A. Different in the way it was laid in.

Q. Now, you are speaking of stratification?

A. No, you say texture?

Q. Yes.

A. Clay, the particles are all the same size. Whenever a body of clay such as you have at 43, containing particles of matter which is not clay, and notably slag, it must come from a nearby iron furnace, you are forced to conclude that it is artificial fill put in.

Q. So that it was the presence of the slag in Pit 43 that influenced your judgment that that clay was artificial fill?

A. It supported my judgment.

Q. And without the slag would you still have been of the opinion that that clay was artificial fill?

A. Decidedly.

Q. So that in Pit 43 you had clay which to your mind was artificial fill, even though the slag had not been there?

A. Yes, sir; in fact, I didn't notice the slag until my eyes had swept over the bulk of the space.

Q. Was there not any difference of quality and texture of the clay, aside from any question of lamination?

A. The clay particles would have been the same class of particles as existed elsewhere.

Q. Taking some of the clay in one of the pits which you say was clay naturally laid down, and taking it out of the pit, and taking some of the clay out of Pit 43, which was artificially laid down, tak-

[fol. 977] ing the two as exhibits, could you have distinguished them apart?

A. No, not in small pieces but don't forget that you must not take a part; you must take a whole?

Q. Oh, yes, I appreciate it, but I am only directing my attention now merely to the character of the clay itself as clay?

A. Yes, you could take this naturally deposited clay here and then remove some material and mix it up with other foreign matter and move it around with a wheelbarrow and one thing and another, and you would have the same material but you would have obviously an artificial fill.

Q. As you said, I think, what made the artificial fill in 43 particularly obvious was the presence of foreign matterials?

A. Yes, sir.

Q. You say that there was no sand in this clay which you designate as natural formation, and I think you qualified that by saying you couldn't distinguish any sand with the naked eye?

A. Yes.

Q. In other words, your conclusion is based upon the absence of particles large enough to discern with the naked eye?

A. And the general appearance of it, of the cross-section.

Q. Yes. Well, now, you have sand, of course, in all sorts of finely divided particles, of all sizes and character, and the difference between sand and clay is a chemical difference, isn't it? When you get the sand as fine as the clay part of it?

A. It is chemical and physical.

[fol. 978] Q. When you get the sand particles as small as the clay particles, not discernable by the naked eye, the only difference is chemical?

A. Also physical.

Q. Physical, microscopical?

A. No, the crystalline structure.

Q. But that is not discernable by the naked eye, I take it?

A. No.

Q. So the presence or absence of sand of the same size particles of the clay in these pits which you have testified to, would depend upon a chemical or microscopic examination?

A. But you must remember that even a very finely divided sand, the kind you are referring to, will begin to behave like clay.

Q. Well, now, if you go back to the question, of course, I would like to get that answer.

A. And what is the question.

Q. (Question read by the stenographer.)

A. Yes, sir.

Q. And the question of where the creek would lay down sand or lay down the clay, or distinguish between them, is a question determined entirely by the mass of the particle, isn't it, and not by its chemical constituency?

A. Yes, at a given point.

[fol. 979] By Mr Moser:

Q. Mr. Knowlton, have you from time to time in your life spent a good deal of time along the shores of Lake Ontario?

A. Yes, a good deal of time.

Q. Have you observed the action of the waves in throwing logs upon the shore?

A. Yes, sir.

Q. Tell us what you have observed with reference to whether or not logs will be cast upon the shore by waves above the level of the water.

Mr. Oviatt: When still, you mean.

Q. Above the level of the water when still.

A. Well, a log on the shore of the lake might be anywhere from underneath the sand, underneath the ordinary level and upon the beach, and as high as into the adjacent field or woods, if the bank came down within reasonable reach of the lake, and, by reasonable reach, I mean several feet above the ordinary lake level. I

have seen floating debris like logs cast up above a point where there was a permanent grown of pasture or woods.

Q. You mean cast up by the waves or storms?

A. By the surf, storms, wind storms.

Q. Can you say, then, whether or not the presence of logs on the shore give us any indication of where the level of the water ever was?

A. Why, none whatever, because there are pits here that show logs well underneath the level of the surface, and if you would make a search along the lake shore you would find logs well above [fol. 980] the level of the lake.

Q. You mean well above the level of the lake, the level of what the lake has ever been?

A. Yes, except as a crest of a wave would break on the shore and throw a log away up.

Q. Now, did you make any examination of the shore up along the Genesee River, near its mouth, at Charlotte?

A. Well, I walked up on the east bank of the river above the drawbridge, above the railroad drawbridge.

Q. Yes.

A. I looked up and down there to see if there was anything like a permanent grass line, which you would have a right to figure in a river, but I didn't find anything that I felt was such a line at all.

Q. Well, by what, if anything, do you account for the absence of such a line?

A. Well, the drawbridge is pretty well down the river toward the lake, and you would have the wash of the waves in a heavy blow, and also those big ships going up and down there which slop the water up against the side of the banks and would tend to cut them; in fact, there is a cut bank action on the east side there, so that you don't find any well defined vegetation line.

Q. What do you mean by a cut bank action? What do you mean?

A. Well, the slop of the water will work the bank into a vertical face, undercut it a little, and it will fall down and you might have a section of it fall down to the surface of the water; it might be underneath the average level.

Q. Did you see boats moving up and down the river?

A. Oh, several times.

[fol. 981] Q. Well, did you observe any swell produced by those boats?

A. Did I what?

Q. Did you observe any swell produced by those boats?

A. Yes.

Q. Did you observe the action of that swell upon the shore, if any?

A. Well, it washed it up and back and up and back, and finally quieted down.

Q. Did you observe any marks on the piers of the drawbridge?

A. That wooden fender around there has some streaks on it.

Q. By what do you account for those?

A. Well, the first streak consists of two zones. One has a slightly gray cast, and, then, below that a definite gray, and I inferred that the gray was the result of the loosening of the cellulose fibers of the

lumber, which would give them a gray color, and if that strip was immersed then in water for a long enough time it would again become dark; so I inferred that that gray strip was the result of some kind of abrasion, either by ice or debris coming down the river, and the washing, constantly washing of these loose fibers by either the wave action or by the wind or vessels passing.

Q. Well, did you examine along the lake shore and along the river banks and objects in the river to determine whether or not there were any marks, or any series of marks at sufficiently the same elevation so that it could be said that the level of the water had stood at that place for any considerable period?

A. Well, there is a pretty clear indication there, the growth of vegetation, marine vegetation, both on the planking of the pier guard and on the rocks that are dumped in around the abutments.

[fol. 982] Q. You found that in the river?

A. In the river, yes.

Q. Did you find anything of that kind in the lake?

A. No. I didn't look in the lake, no. And this observation in the river would not be an indication of the exact level of the affairs in the river.

Q. Why not?

A. They would be higher, they tend to be hi-

Q. Why would they tend to be higher in the river?

A. The river flows down hill.

Q. Well, do you consider that line of vegetation,—you mean of water vegetation?

A. Water vegetation.

Q. The kind of vegetation that grows under the water?

A. Yes.

Q. Did you find any line that was of sufficient permanence or reliability that you thought you could state with any reasonable certainty that the water had been there for any given period?

A. Yes, sir, I did. On the timbering of the guard pier on the drawbridge.

Q. Well, that timbering has only been there since 1919. Did you measure the elevation of the top of that vegetation that you found at the drawbridge?

A. Yes. I ran line levels from the bench mark at the lighthouse down to the shore, and took an elevation on this upper limit of this vegetation.

Q. And what was the elevation of that? What was the upper limit of that vegetation at the drawbridge?

A. 245.86.

By Mr. Sutherland:

Q. One question, Mr. Knowlton. I wish to call your attention to three places in the volume which is in evidence, containing the [fol. 983] Shepard notes and the Finley notes from the Finley map.

Mr. Abbot: That's Defendants' Exhibit 3.

Q. Defendants' Exhibit 3. First, on page 106, in the item as follows: "508 to a post marked H 21, standing on the shore of Lake Ontario;" next, on page 108, under the item, "104 along the shore of the lake to post marked South 2, N. 21;" again, on page 109, under the heading, "East line 93 to a post marked S 21 22." On each of those items that I have mentioned, as you look at it you will observe some wave lines: do you see the lines that I have reference to?

A. Yes, sir.

Q. What do those wavy lines indicate to you as a surveyor and engineer?

Mr. Oviatt: I object to that. That is not the proper test of the meaning of those lines. The question is whether those lines have any generally accepted significance in the profession of surveying. Those lines may mean something different to every individual in this court room.

The Master: I thought you were objecting a while ago to the opinion of the scientific men generally, but you only wanted the opinion of the witness.

Mr. Oviatt: Yes; but we are not in the realm of opinion now.

The Master: Oh, yes, we are.

Mr. Oviatt: Oh, no. It is very bold of me to differ with the Court, but we are in the realm of the skilled witness now, as dis- [fol. 984] tinguished from the expert witness. This man may testify to the fact that something has a common significance, but he can't testify as to what one man's notes may mean to him with reference to a symbol. That symbol either has an individual significance with the man who used it, or an accepted significance in the profession.

The Master: I assume that the question is intended to bring from the witness what the general meaning is to the engineer.

Mr. Oviatt: I think that's what the judge meant to do, but he didn't do it.

The Master: Yes. He may have however, the answer.

Q. (Question read by the stenographer.)

A. They indicate water.

The Master: What would they indicate to any other engineer or surveyor?

Witness: That's the accepted indication.

The Master: They wouldn't indicate anything else to any other engineer or surveyor?

Witness: No, sir.

The Master: I suspected that all the time.

Mr. Sutherland: Your Honor, we would be very glad if the Court would formulate a question for the witness Richmond to answer, conforming to your Honor's present idea of what constitutes ordinary low water, or average water, or ordinary high water. If there is some form of question which your Honor can give us which our ex- [fol. 985] pert can follow, we should be very glad to have him make a calculation based upon your Honor' own wish and thought in the matter.

The Master: We couldn't undertake to determine what definition the Court might give to the phrase, "low water," or, "low water mark." I was only undertaking to get from the witness the dif ference, if there is a difference, between what he calls, apparently, "average low water," and "ordinary" or "usual low water." That's what I was trying to bring out, that distinction, leaving it to the Court to determine upon the examination of this testimony and the issues in this case, what is meant by "low water mark," if that does effect the questions in controversy.

Mr. Sutherland: May I ask the witness, then, what engineers, hydraulic engineers understand by the term "low water mark," as applied to lake levels?

Mr. Oviatt: Now, I think, if your Honor please, this is a case where it is for the Court to determine as a legal question where the water line which is significant is to be drawn. The Court has all the data. It may be that the Court will pronounce a judicial definition as to what is ordinary high water, or any other term that it may choose to use, but I think the Court has before it the facts, and that no light can be of any use, shed by any witness, as to the meaning of a term with reference to which even the judicial question isn't [fol. 986] determinable. In other words, we don't know now what the Court is going to lay down as a rule of law applicable to this state of affairs. It won't be any clearer rule, or any easier to apply if this witness testifies as to what ordinary high water is, or ordinary low water. The question is for the Court to determine where the boundary lines are with reference to all these facts, and to define what ordinary high water is isn't going to accomplish anything except to confuse us.

The Master: Well, if Judge Sutherland wants that question answered we will let it be answered.

Mr. Abbot: Will you note our exception.

WALDEMAR S. RICHMOND was thereupon recalled as a witness and testified as follows:

Direct examination.

By Mr. Beach:

Q. Mr. Richmond, have you made a computation as to the time during which the water stood, during the period from 1860 to 1922, inclusive, above and below the mean of 246.16?

A. I have.

Q. Will you give the number of months when it stood above that and below it?

A. I find that there are 371 monthly means above the elevation of 246.16, and 385 below that elevation.

Q. Now, Mr. Richmond, taking 246.16 as the mean, will you tell us perhaps without the use of figures, whether or not the ordinary

low water mark would be substantially below the mean, and remain at that point below the mean for a considerable period of time?

A. (Witnes did not answer.)

[fol. 987] Q. In other words, is the ordinary low water mark of the lake below 246.16, to bring it to a point.

A. It is.

Q. And from the charts, and from your study, was the prevailing level of the low water mark considerably below 246.16 during that period from 1860 to 1922?

A. It was.

Q. You have stated the ordinary low water mark was 245 and what? .33?

A. Yes.

Q. Now, I ask you, from your study of the charts, and from the data sheets, the monthly means which you had before you, whether you would say whether that elevation of the water could be said to be a prevalent elevation?

A. (Witness did not answer.)

Q. That elevation of 245.33?

A. As I understand the question, I'd say yes, I do.

Q. In other words, you would say that the water stood at about that point during the greater part of the time when it was at the low levels?

A. No, I wouldn't say that. I'd say that perhaps it stood at that point more than at any other on the low side.

Q. It fluctuated up and down to some extent?

A. Yes, sir.

Q. And from your experience as a hydraulic engineer, you have stated, as I understand you, if not, you will say so, that you believe that to be the ordinary low water mark of the lake during that period.

Mr. Oviatt: I object to that.

[fol. 988] The Master: He may answer it.

A. In my opinion, that is ordinary low water.

Q. Basing that upon the duration and length of time during which the water stood there or lower, or thereabouts; is that true?

A. I didn't ordinarily base it on that. I think that would be true.

By the Master:

Q. Mr. Richmond, I take it that you understand that the distinction that is being made here by the examination in chief and cross-examination is between what you call, or may call, the average low water level and the usual or prevailing or ordinary low water level. For example, you could at once see the difference between the average charges by an engineer for services and the usual charges of engineers. The average charge might not be the usual charge at all. Now, if it should be important in this case, it is desirable to ascertain what was the ordinary, usual low water mark, or low water level of Lake Ontario. From those charts you have ascertained an

average below 246.16, which you call the "mean" or "ordinary low water," but that is, after all, an average of the average low water mark, isn't it?

A. (Witness did not answer.)

Q. Now, if you understand the difference I have been trying to point out, would the usual, general, prevailing low water mark, not necessarily stationary, but approximately stationary,—would it be, from your study of these charts, above or below what you have designated as 245.33?

A. It seems to me that it would be just about the same. I have used the terms, "mean" and "ordinary" as practically synonymous. [fol. 989] Q. Yes, but in each instance, however, you have meant "average"?

A. Yes. If the term "prevailing" meant something different, I wouldn't be able to say now, from the study I have already given, that it would give a different level from that "mean" or "average." I mean by that that the record shows that water prevails lower at times and higher at other times. It seems to me the average would have to be defined as the prevailing, even if it lay between two prevailing levels, one of which was higher and the other was somewhat lower.

By Mr. Oviatt:

Q. Your use of the words, "average," "ordinary," "prevailing," and so forth, is based purely upon a mathematical computation of averages, isn't it?

A. The value attached is——

Q. (Interrupting.) It is a mathematical calculation?

A. Yes.

Q. Having no reference to the effect of the water upon shore line, or its effect upon beaches or vegetation or anything of that kind?

A. No. It is deduced from gauge observation.

Q. And by mathematics?

A. Yes.

Q. Now, you say that your "mean low" might be said to be a prevalent level. I call your attention to water level chart, showing 1860 to 1922, and I ask you if in any year the water was at that point of 245.33 more than twice a year, and on those occasions not for a longer period than some fraction of a month.

A. Four times in one year.

Q. Four times in one year? What year was that?

A. 1915.

Q. Any other years?

A. Four times in 1920.

[fol. 990] The Master: Of course, it must have passed that point going up and down.

Mr. Oviatt: Going up and down.

The Master: Hundreds of times every year.

Mr. Oviatt: Oh, no; only twice a year, when it went down and when it went up.

Witness: My answer refers to monthly average. The daily mean may or may not have fluctuated.

Q. The chart shows an annual fluctuation or periodicity?

A. It does.

Q. Up at one season of the year, and away down another season of the year?

A. That's generally true.

Q. And there are some years in which the waters did not go down as low as what you call your average low water; isn't that true?

A. That's true.

Q. When it did touch the point that you speak of as low water, or average low water, it touches that point as it descends, and it touches it again as it ascends during the year, in the vast majority of cases?

A. Taking the monthly average.

Q. So that what we have is an annual fluctuation from a high water to a low water, passing all the intervening points on each fluctuation, once when it goes down, and again when it goes back up; is that right?

A. That's generally true.

Q. And in the vast majority of instances on that chart it touches any particular point only twice a year; is that right?

A. Yes, sir.

[fol. 991] Q. Some years not going down as low as what you call your average low, and other years going away above the point which you call your average high?

A. It goes below the average low and above the high.

Q. But sometimes it does not even get down as low as your average low?

A. There are some years that it does not.

The Master: And sometimes it goes much lower?

Mr. Oviatt: And sometimes it goes much lower, exactly.

Q. In other words, what you really have is an annual periodicity of a rise to the highest point and fall to the lowest point, the former being in the summer time, and the latter being in the winter; is that right?

A. That's right.

Mr. Oviatt: That's all.

By Mr. Beach:

Q. Mr. Richmond, I show you a map, and ask you what that is.

A. That is a printed chart issued by the United States Lake Survey office, showing Lake Ontario, and it is what is known as the "General Chart of Lake Ontario."

Mr. Beach: I offer that in evidence.

(Whereupon, the map referred to was received in evidence and marked, "Defendants' Exhibit Number 27.")

Q. Will you read into the record the comparative elevations of water levels as they appear on that chart, reading the legend and the figures?

A. The table to which you refer is headed, "Comparative Elevations of Water Levels on Lake Ontario, Referring to Mean Sea [fol. 992] Level, Adjusted Levels of 1903." The entries on the table are as follows: "High water of 1838, 248.98 feet. Mean stage, 1860-1919, both inclusive, 246.19. Low Water datum for harbor improvements, 1916, 244.50. Lowest recorded monthly mean, November, 1895, 243.31 feet. Plane of reference of this chart, standard low water, 243.00 feet."

Q. That's an official government map, is it not?

A. It is.

Q. And in making that datum and putting it upon that chart they have accepted the means as proper data for their charts and references?

A. Yes.

By Mr. Oviatt:

Q. In other words, this, too, is founded upon a mathematical average computed?

A. The mean stage entry is a mathematical average.

Q. Yes.

A. The other entries are not

Q. That is, the extremes, highs and lows, are not, but all means are mathematical averages?

A. There is one mean. The rest are high and low, and two different datums issued by the government.

By Mr. Beach:

Q. Then, Mr. Richmond, the government has officially adopted this mathematical means or formula of arriving at high and low water marks?

A. Yes.

By Mr. Oviatt:

Q. This map purports to be a chart, does it not, of the lake bottoms?

A. It is a topographical chart.

Q. Showing depth of water?

A. Really, a navigator's chart of the Great Lakes, showing depth of water.

Q. It is a navigator's chart?

A. Yes.

[fol 993] Q. Are you familiar with the practice of all the nations of the world for making charts for navigation purposes, to indicate low water because the sailor is interested in how little water he has got, and not how much water he has got along the shore lines?

A. The sailor is particularly interested in low water, yes.

Q. Yes. In preparing charts by all the civilized nations of the world, they give the extreme shallow water, either as affected by tides or any other circumstance, in order that the sailor may have the margin of safety; am I right?

A. I'm familiar only with the lake charts.

Q. Well, that's true of lake charts, isn't it?

A. Lake charts are based, that is, the water depths are shown with relation to a low water stage.

Q. And the whole purpose of the chart is to show how much water the sailor has above the bottom of the lake or rocks or submerged obstacles; is that right?

A. It is.

By Mr. Beach:

Q. I show the witness a blue print, topographical blue print, showing lines indicating levels of the lake at various periods, and ask if you made that from the figures shown upon Plaintiff's Exhibit 56, that is, that sheet of elevation data which I now show you.

A. From the data on Plaintiff's Exhibit Number 56 I made the tracing from which this sheet in my hand is a blue print, showing the plot of the water stages of Lake Ontario between the dates 1815 and 1859. It is merely a graphical representation of the data on Exhibit Number 56, but based on the elevation of the gauge, zero, [fol. 994] at Oswego, of 244.12.

Mr. Beach: I offer that in evidence.

(Whereupon the blue print referred to was received in evidence and marked, "Defendants' Exhibit 28.")

Mr. Abbot: I don't know whether Mr. Getman is here. We have informed him of the intention to enter into this stipulation in regard to the title deeds of the various defendants here. Mr. Getman, as I understand, says he has no interest in that stipulation, that he has not examined it and does not care to sign it, but, on the other hand, has no objection to its being entered into, and will not controvert it in any way, nor raise any objection because his signature nor the signature of New York does not appear on it in any way. Am I correct in that?

Mr Getman: You are now referring to the chain of title of the defendants from the grant of Massachusetts to the present time?

Mr Abbot: Yes.

Mr. Getman: You are correct.

Mr. Abbot: I just want to note that on the record, because in the absence of this stipulation we want to account for that.

The Master: Have you agreed on the stipulation?

Mr. Abbot: Substantially, I think. We have not had a chance to finish the preparation of the map that was delivered to me this [fol. 995] afternoon, the blank maps upon which the various descriptions in the deeds are to be noted in connection with the stipulation. That is here, and I understand that will be done, and that

will complete the stipulation. I understand that's correct, is it not?

Mr. Beach: Yes, sir. I would like to offer this in evidence, if your Honor please, a map of the Phelps and Gorham Purchase, which I understand there will be no objection to, and which your Honor asked for just a short time ago.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit Number 29.")

Mr. Abbot: One other matter, your Honor. I spoke to Mr. Beach, and he was entirely agreeable that a certain portion of the Shepard notes, which are now in evidence as Exhibit 3, be actually copied into the record for convenience of use. I have already indicated that to the stenographer. It is simply going in as an excerpt from those notes, instead of having the whole book, which, of course, is in the county clerk's office.

The Master: All right.

Mr. Moser: This is something I have spoken to Mr. Abbot about before. I have already done it, but so that there will not be any mistake about it I would like to have it appear upon the record that any evidence offered, or any objection taken by any defendant, may inure to the benefit of all of them.

[fol. 996] The Master: I think that is understood. Let the record show that.

Mr. Moser: Mr. Abbot, I am going to offer in evidence the order entered in the Supreme Court, Monroe County, in the matter of the application of the City of Rochester to acquire certain lands for park and other municipal purposes in the Twenty-third Ward in this city, which was entered on the 27th of April, 1920. I offer the original order, but with the consent of counsel substitute a copy therefor.

Mr. Abbot: What is the purpose of this?

Mr. Moser: The purpose of it is to fix the date on which the city took this property over, and it was done under the order of the Court That is the only thing it is offered for.

Mr. Abbot: Is there any description in that, that is, is it set out by metes and bounds?

Mr. Moser: Perhaps, instead of putting this whole order in we can make a stipulation and save about three pages of typewriting. Note this on the record: That on the 26th day of April, 1920, the Supreme Court in Monroe County made an order in the matter of the application of the City of Rochester to acquire certain lands for park and other municipal purposes in the Twenty-third Ward in said city, which order authorized the City of Rochester to take immediate possession of the real estate; rights and easements sought [fol. 997] to be taken in that proceeding, and that the city did, pursuant to that order, take possession of the premises which are in dispute in this suit.

Mr. Abbot: Well, they went in and occupied.

Mr. Moser: You distinguish between "they went in and took possession," and "went in and occupied?"

Mr. Abbot: I do.

Mr. Moser: They entered upon the premises and have been in occupation of them ever since.

Mr. Abbot: That's all right.

[fol. 998] FRANKLIN J. HOWES, a witness produced and sworn on behalf of the defendants, examined by Mr. Beach, testified as follows:

Q. You reside in Rochester?

A. Yes sir.

Q. And you are employed by the Rochester, Gas & Electric Corporation?

A. Yes sir.

Q. In what capacity?

A. Chief engineer.

Q. As chief engineer, do you have anything to do with the hydraulics of that company?

A. Yes.

[fol. 999] Q. For how long, have you been interested and engaged in that sort of work?

A. I have been chief engineer for the company for a year and a half, but for the greater part of eighteen years, I have been connected with the hydraulic operations of the company.

Q. In that operation have you had occasion to make tests and observations and guages of the Genesee River?

A. Yes.

Q. Will you describe very briefly what sort of a stream the Genesee River is so far as the rate of flow of the water and the quantity of water etc. is concerned?

A. The Genesee River is known among hydraulic engineers generally as one of the flashiest streams in the country. That means that it changes its rate of flow very suddenly, and between very extreme limits.

Q. Depending upon what, very largely?

A. Well, rain fall, and melting snow. One peculiarity of the river is the very small amount of storage in lakes and swamps as compared with most rivers, so that when the rain does fall and the snow melts there are no very large bodies of water to retain it, and it usually runs off very rapidly.

Q. Is it affected by rain storms in the early summer?

A. Somewhat.

Q. Does that cause the water to rise and fall rapidly, to some considerable extent under those circumstances?

A. It causes it to rise very rapidly, that is, a thunder storm in June and July, in which there is any considerable amount of rain, usually [fol. 1000] followed very soon, that is two or three days at the outside, and sometimes inside of twenty four hours, by a very marked rise in the river.

Q. Give us some idea of the extent of the rise of the river during these June floods and during the Spring rains from your observation and record?

A. Well, in the period that I have watched the river, the extreme maximum flow is about three hundred times the minimum flow, and by that I do not mean the absolute minimum, because there is one case on record when for five hours no flow at all was recorded; but the minimum flow that we ordinarily expect to continue is about one three hundredths of the maximum.

Q. Give that in cubic feet per second, if you can?

A. Twice in my observation the flow has exceeded the amount that was estimated at forty five thousand cubic feet per second, and several times it has been less than 150 cubic feet per second.

Q. With that extreme rise or even a normal rise, will you tell us very briefly the elevation of the water as a result of that?

A. Well, of course that is different at different places, but there is one place where we measure that with a recording gauge. Down below the driving Park Avenue bridge at our station number 5, in the city of Rochester, where Driving Park Avenue crosses the Genesee river, the Rochester Gas & Electric Company maintain a hydro [fol. 1001] electric generating station, in which a recording gauge is installed, to show continuously by a curve that is drawn mechanically, the elevation of the water surface of the river below the falls.

Q. Now what variations occur?

A. So far as I remember, the extreme variation within recent years has been only about twelve feet, but I do not believe that that included either the maximum or minimum flow.

Q. Well, that would be a very safe estimate?

A. We can depend upon its varying pretty nearly twelve feet every year with some extremes.

Q. At that point it is some distance south of Lake Ontario, is it not?

A. Yes, I don't remember exactly, but I think five or six miles.

Q. Now, the flood of the river at its high points, would it continue to some extent at any rate down towards the lake?

A. Yes, and at any elevation between the surface level at that station and the surface level at the lake, it is not sudden or abrupt, it is a gradual descent.

Q. But you haven't taken any actual measurements of the increased heighth of the river down near the lake at this point?

A. No, sir.

Q. But from your experience and observation of the acts of the river, what would you say as to whether these extreme rises would materially affect the heighth of the river probably all the way to the lake?

A. Yes, they would affect it all the way to the lake, but the effect [fol. 1002] of course would be less as the lake is approached.

Q. During these floods and high waters, what have you observed if anything, in regard to the material and so on, that was carried down by the river?

A. When the river is in flood, it carries a great quantity of debris of all kind, especially ice, large cakes of ice, sometimes quite large trees.

Q. Any considerable amount of driftwood?

A. Ordinarily, yes, there is usually a great deal of small stuff, boards, and miscellaneous rubbish of all kinds, which is brought down the river.

Q. Have you any definite recollection as to the distance of station 5 from the lake?

A. Not definitely, I have no map with me but a map is reasonably available that would show it exactly. The river is quite crooked between those two points, and the length of the river as it flows, of course governs rather than a bee line distance.

Q. What about the substances in the water, that is, as to whether it carries down in these floods considerable soil and mud and so on?

A. There is a good deal of silt, but I could not tell you how much it averages. I think I remember once that I was interested in that, and I took a sample of water, in which the solid matter was about two per cent of the total, that was at extreme flood stage, and of course is considerably greater than the average.

[fol. 1003] Cross-examination.

By Mr. Oviatt:

Q. The company with which you are associated, maintains a number of dams does it not?

A. Yes.

Q. And those dams are intended to store water above in order to use it in periods of relatively low water in the Summer?

A. No, not to any great extent. The function of the dam is rather to divert the water from the natural channel into a penstock.

Q. Are there no storage dams?

A. Well, at present, the only storage dam we maintain, we have a storage dam just above this station 5, and that is the only one we maintain in the city.

Q. Aren't there other storage dams above there?

A. There is one at Mount Morris.

Q. The material that is carried down by the river is of what color?

A. The color varies a good deal, but I think I would call it a brown, coffee color. It is about the color of coffee with cream in it.

Q. And that is the characteristic color, is it not, of the material carried down by such streams from the soil in this locality?

A. So far as I have observed, yes.

Mr. Sutherland: Your Honor, I wish to offer in evidence certain treaties with the Indians that are contained in a volume of American state papers published under the authority of Congress. I iden-
[fol. 1004] tify as Volume 5 American state papers being Volume 1 of Indian Affairs. First a Treaty on pages 1 and 2 of that volume,

between the United States and the Six Nations and others, made at Fort Palmer January 9, 1789. That is one of the three treaties which were mentioned by the Indian secretary when he appeared before the Court here. I wish to put in evidence the three treaties which he mentioned, so that they are before the Court, if there is any need of seeing them.

Next a treaty at Fort Stanwix at page 10 of that volume, between the Seneca, Mohawks, Onondagas and Cayugas, to Oliver Woolcot, Richard Butler and Arthur Lee, commissioners of the United States.

There was a treaty before that time at Fort Stanwix, concluded between the Indians and Sir William Johnston made I think, in 1768, which effects the east boundaries and southern boundaries of the lands which were then agreed should be the Indian lands. I have asked Mr. Cuff to search through the library and see if he can get a copy of that treaty made by Sir William Johnston, and I think he probably can find it, but it does not seem to be in this volume of Indian Affairs. I think, perhaps, that treaty of 1768 is the treaty of Fort Stanwix that the Indian secretary may have referred to, and it may be that this other treaty at Fort Stanwix is the one. I will see if I can supply that.

[fol. 1005] The treaty of Buffalo Creek I think Mr. Abbot put in evidence the first day. That is the treaty between five of the Six Nations, with Phelps and Gorham, under which they extinguished the Indians' title to the Phelps and Gorham contract.

Supplementing that, I offer in evidence a quit claim from four of the Six Nations which appears at 211 of the volume which I have mentioned, and I will say to Your Honor, that this supplementary treaty on page 211 is made by the Mohawks, Onondagas, Cayugas and Tuscaroras. The Tuscaroras were not represented at the treaty of Buffalo creek, and these four nations and their representatives met at Canandaigua on the fourth of August, 1789, and there the Tuscaroras confirmed the treaty of Buffalo Creek, and said they would stand by it. The treaty at Buffalo Creek was made by five of the Six Nations and the Tuscaroras were not there represented, but they confirmed that at the treaty at Canandaigua, the 4th of August, 1789.

I offer in evidence next the Pickering treaty so-called, made at Canandaigua, between the Six Nations and others, and Timothy Pickering represented the United States November 11, 1794. That treaty is found at Page 545 of volume 1 of Indian Affairs.

[fol. 1006] I next offer in evidence the Big Tree treaty so-called, entered in September 15th, 1797, between the Seneca Nation of Indians, and Robert Morris. That appears on page 627 of volume 1 of Indian Affairs.

The Master: I think it will not be necessary to read or incorporate those treaties in evidence. They may be regarded in evidence.

Mr. Abbot: Might I add to what Judge Sutherland has said about the last two treaties, that you will also find them volume 7 or 8 of the Statutes at Large, both the Pickering Treaty and the Big Tree treaty are the ones I refer to.

Mr. Sutherland: Mr. Abbot, did you put in evidence chapter 135, passed April 1, 1788, by the General Court of Massachusetts?

Mr. Abbot: Yes, th-t was incorporated in Exhibit 3 as I recall it.

Mr. Sutherland: Very well, if that is in evidence, I won't go over it again.

Mr. Sutherland: I offer in evidence a copy of an instrument executed by John Hancock as Governor of the Commonwealth of Massachusetts to Nathaniel Gorham and Oliver Phelps, as parties of the second part, dated April 23, 1788.

Whereupon the paper last above referred — was received in evidence and marked Defendants' Exhibit 30.

[fol. 1007] Mr. Sutherland: I offer in evidence, your Honor, the treaty or deed executed at Fort Stanwix, on November 5, 1768, between the Six Nations and Sir William Johnson, representing King George III. This is found in volume 1 of the Documentary History of New York State, published by authority of the Legislature and compiled by the Secretary of State.

I offer a map also which is attached to this copy of the original Fort Stanwix Treaty. This Treaty, your Honor, shows the eastern line of the Indian lands and they quit-claimed to the White everything east of that and south of the southern boundary line, that is, that ran down to the Ohio River.

(Whereupon the document referred to was received in evidence.)

Mr. Sutherland: I now offer in evidence an indenture between the Commonwealth of Massachusetts and Gorham and Phelps, dated June 9th, 1790.

Mr. Abbot: As I understand it that's taken from the archives of Massachuetts, is it not?

Mr. Sutherland: Yes, it is a copy that we got and it is not certified, and if there is any error in that I would be very glad to have you correct it.

Mr. Abbot: If you prefer, I will give you a certified copy.

Mr. Sutherland: I would just as soon have that substituted.

[fol. 1008] (Whereupon Mr. Abbot produced a certified copy and gave it to Mr. Sutherland.)

Mr. Sutherland: Then, the certified copy is substituted for the one which I offered.

(Whereupon the paper referred to was received in evidence and marked, "Defendants' Exhibit Number 31.")

[fol. 1009] Mr. Sutherland: I offer in evidence chapter 153 of the Laws of Massachusetts, passed March 5, 1790.

Also a Resolve, entitled Chapter 45 of Massachusetts passed February 18, 1791.

Also a Resolve entitled Chapter 65, passed June 17, 1791.

I offer in evidence now a photostat copy of the Act or Resolve of the Massachusetts Legislature passed March 8, 1791, in order to

show an amendment made by the Senate to the Act as it passed the House of Representatives. We have a photostat copy of the original manuscript Act, showing the amendment made by the Senate to which we wish to call special attention when we come to sum up the case.

Mr. Oviatt: Any of the Acts of either House or resolutions adopted prior to the passage of the Act, which became a law or Resolve is objected to on the ground that it is incompetent, immaterial and irrelevant and that the rules which might in some cases apply to the interpretation of statutes of a public and general nature are in no degree applicable to an act or resolve of this character.

The Master: I will let it go in.

Whereupon the paper last above referred to received and marked Defendants' Exhibit 31-A.

[fol. 1010] Mr. Sutherland: I offer in evidence a certified copy of a document dated May 11, 1791. This document conveys the five hundred thousand acres of land lying just west of the Phelps and Gorham actual purchase.

Document above referred to, received in evidence and marked Defendants' Exhibit 32.

Mr. Sutherland: I offer in evidence a photostat copy certified as such of the Resolve which passed the Senate June 19, 1792, and which passed the House of Representatives June 20th.

Mr. Oviatt: I make the same objection to this as to the previous offer of the Act of either branch of the Legislature.

The Master: Let it go in and let the objection be noted.

Whereupon the document above referred to was received in evidence and marked Defendants' Exhibit 33.

Mr. Sutherland: I offer in evidence a photostatic copy of a report of the committee relative to sale of western lands to S. Ogden, an indenture, release and four deeds, also, which are attached thereto, the entire bundle of documents being certified by the secretary of the Commonwealth of Massachusetts under date of May 24, 1922. I offer the entire certification in evidence.

[fol. 1011] Whereupon the document last above referred to was received in evidence and marked Defendants' Exhibit 34.

Mr. Sutherland: I offer in evidence document 106, House of Representatives, twentieth congress, second session entitled: "Survey Genesee River, Lake Ontario, Oswego River, etc." which contains a report of Theodore W. Maurice, Captain of Engineers. That is made in 1829 and refers to the projected building of the piers.

Whereupon the document above referred to was received in evidence and marked Defendants' Exhibit 35.

Mr. Sutherland: I offer in evidence a photostatic copy of an opinion of Caleb Cushing, then attorney general of the United States

rendered to Jefferson Davis then secretary of War, dated July 3, 1855, with reference to a claim for damages made against United States Government by the owner of lot 22, in which is stated the findings of the attorney general with reference to the formation of the land at the mouth of the Genesee River.

Mr. Abbot: I wish to object to that as incompetent, irrelevant and immaterial. I do not understand that there is any general finding of fact, anyway that is beyond his power. It seems to me that the opinion of the attorney general, with reference to a state of facts supposed to exist at the mouth of the Genesee River, with no evidence as to how he learned those facts, or the source, or any proof of them is utterly incompetent as between the parties.

[fol. 1012] Mr. Sutherland: This is an official report made by the attorney general to the secretary of war, with reference to a claim that was submitted to the attorney general to pass upon. It involved the title of the Government to the property and the title of the claimant to the adjacent land and the method by which that land was formed. It was an official document issued by him in the course of his official duties to the secretary of war with reference to a claim made upon the government by reason of the conditions existing at this very spot.

The Master: Of course you do not contend that that in any way binds the Commonwealth of Massachusetts.

Mr. Sutherland: It is only such evidence as may assist the Court in determining what the actual condition was as to the formation of that land, and the conditions that obtained there in 1854.

The Master: We will let it in.

Exception to the plaintiff.

Mr. Sutherland: There is no certification upon this, Your Honor, but I understand Mr. Abbot does not object to that. It is a photostatic copy taken from the printed volume.

Whereupon the document last above referred to was received in evidence and marked Defendants' Exhibit 36.

Mr. Sutherland: In connection with the Big Tree Treaty, which is on page 27 of volume 1 of Indian Affairs which was put in evidence [fol. 1013] this morning, we desire to have also in evidence the certificate of William Shepard, the superintendent appointed for that purpose by the Commonwealth of Massachusetts, which follows the treaty and is printed 628 of volume 1 of Indian Affairs, being volume 5 of American state papers.

We want to put in evidence also, the Act of the General Court of Massachusetts in 1835 establishing a Statute of Limitations with reference to suits brought by the Commonwealth of Massachusetts, and the subsequent Acts amending that statute. We have not a list here at hand of the subsequent acts, but I wish it could be understood that any act of the Legislature which has not been specifically called attention to on the hearing, may nevertheless be read and considered by Your Honor in deciding this case, because we want to go through the whole of the Massachusetts statutes and see if there is any-

thing there that might be of importance. We have tried to call attention to these statutes we have in mind, but there may be others, and if such a stipulation can be made, we will reciprocate so far as any legislative act is concerned.

The Master: I imagine you would have the right upon oral argument or any brief, to call attention to any such statute as you see fit.

Mr. Abbot: May I note an objection to this particular statute. [fol. 1014] I do not see how this particular statute purports to be a statute of limi-ations passed in Massachusetts, what effect it can have on Massachusetts——

The Master: That is all a matter of argument.

Mr. Abbot: I object to this one as utterly irrelevant.

The Master: That is a matter of argument.

Mr. Sutherland: I offer in evidence a copy of the Guy Johnson map of 1771, showing the division line made at the treaty at Fort Stanwix in 1768 negotiated by Sir William Johnston. This map has distinctly marked upon it the boundary line between the lands then relinquished to the whites, to the white men, on the east. Perhaps it will show the extent of territory with which the commissioners at the treaty at Hartford were actually dealing, showing the extent of the land, which was quit claimed by Massachusetts to New York on the east of the Pre-emption line and the extent of the land quit claimed to Massachusetts on the west.

Whereupon the document last above referred to was received in evidence and marked Defendants' Exhibit 37.

WILLIAM C. GRAY was thereupon recalled and examined by Mr. Beach and testified as follows:

Q. Mr. Gray, at our request, have you taken a map of the State of New York and lined upon it the approximate boundary of the various deeds which have just been put in evidence, of Robert Morris, of lands west of the Phelps & Gorham purchase?

[fol. 1015] A. Yes.

Q. Have you computed the amount of the acres contained within those boundaries?

A. Yes.

Q. Both the actual land running to the south shore of Lake Ontario and the actual acreage of the waters to the north?

A. Yes.

Q. And you have always computed the acreage of the Phelps and Gorham purchase by measurement and calculation?

A. Yes, on the scale from the map.

Q. And of the bed of Lake Ontario north of the Phelps and Gorham purchase running to the international boundary line?

A. Yes.

Q. How far is it on a straight line measured substantially east and west between the westerly line of the Phelps and Gorham purchase to the easterly line, along the lake shore?

A. About 51 miles.
Q. How far is it on a straight line?
A. 45 miles.
Q. In other words the lake shore curves and bends somewhat?
A. Yes sir.
Q. How far is it from the lake shore northerly to the international boundary line in Lake Ontario?
A. About 25 miles.
Q. How far is it from the southerly boundary of New York State to the lake shore at the point of the Phelps and Gorham purchase, about how many miles?
[fol. 1016] A. O, those lines are from 75 to 90 miles from the Pennsylvania line northerly.

Mr. Oviatt: That's near enough.

Q. This estimation which you have said you made, you have written upon ths map?
A. Yes.
Q. In figures?
A. Yes.
Q. And in some places you have indicated it as acres and other places you have just simply put on the figures?
A. Yes, but it all means acres.
Q. And you have outlined upon that same map the so-called Phelps and Gorham purchase?
A. Yes, and I shaded it with pink.
Q. And you have marked it Phelps and Gorham?
A. Yes.
Q. Have you had occasion to make surveys along the shore of Lake Ontario within the limits of the Phelps and Gorham purchase at different points?
A. Yes.
Q. Will you tell us please what you can say about accretion along that shore at other points than the place in question?

Mr. Oviatt objected.

The Master: Well, strictly speaking, this might not be admissable, but I am not undertaking to exclude any testimony offered by either side in this proceeding.

A. On the east side of the river at Summerville there is a large accretion. Down at nine mile point, west of nine mile point, there is another accretion.
Q. Nine mile point is what?
A. Nine miles east of the river. And at Sodus Bay, Sodus Point [fol. 1017] we call it, is a very large accretion.
Q. How much?
A. O, much larger than the one at Charlotte, twice or three times as large, fifty acres.
Q. What can you say as to other points, like Irondequoit Bay, a few miles east of the river?

A. All along that shore there has been some accretion, and of course there was erosion there at one time, and since that time there has been accretion.

Q. As a matter of fact there is some erosion and some accretion all along this territory?

A. Yes.

Q. Did you speak of points west of the river? Braddock's Bay and so on?

A. Up along Braddock's Bay and the pond up there, there has been a lot of accretion.

Mr. Beach: We offer that map in evidence.

Mr. Oviatt: We will save out objection to all this line of testimony as to accretion at other places.

The Master: O, yes.

Whereupon the map last above referred to, was received in evidence and marked Defendants' Exhibit 38.

Examined by Mr. Moser:

Q. How many acres are included within the body of Lake Ontario south of the international boundary line between the east and west line of the Phelps and Gorham purchase?

[fol. 1018] A. 766,220.

Q. Now, along that shore line of 50 miles, which is the leng-h of the shore line of the Phelps and Gorham purchase, is part of the shore line beach and part of it bluff?

A. Yes.

Q. And where the bluff is there has been erosion, has there not?

A. Yes.

Q. And where the beaches are there have been accretions from time to time within your recollection?

A. Yes.

Q. You have testified to some places where accretions have occurred which are east of the property in litigation in this case?

A. Yes.

Q. And you have testified to some which are west?

A. Yes.

Q. And you have testified to accretions of considerable number of acres?

A. Yes.

Q. You mentioned one place at Sodus where there was fifty acres?

A. Yes.

Q. On that land which you say was formed by accretions, are there any buildings or structures or improvements?

Mr. Abbot: All of this is subject to our objection and exception.

A. Yes.

Q. To go back to the Bartholomay property you were first employed by the Bartholomay company in 1885?

A. Yes.

Q. And prior to that time Mr. Whitney had owned the property and had extensive buildings on it when you were there?

A. Yes.

[fol. 1019] Q. From that time, 1885, have you been familiar with the property down to date?

A. Yes.

Q. Was the Bartholomay Company and the re-organized Bartholomay Company in possession of that property continuously down to the time the city took it over in 1920?

A. Yes, except a strip of 80 feet in width about two thirds of the way up Beach Avenue.

Q. That is what is known as the Burnham strip?

A. Yes.

Q. That they did not acquire till 1915?

A. Yes.

Examined by Mr. Beach:

Q. Did you examine the shores of the Genesee River with a view to ascertaining whether there was any definite line of vegetation, which would show the heighth of the river at any definite or long period?

A. Yes.

Q. What was the nature of the shore in that regard and what did you discover in that respect?

A. There was a sandy shore and about the only piece of grass line that I could find was just south about 150 feet of the railroad bridge on the east side of the river.

Q. As I understood it, you could not find any line which you could definitely say was any water line along the river?

A. No that was the only one. The rest of it was all subject to wash.

Q. How high was that grass line or line of vegetation?

A. That was 246.47.

Q. Were you there when some boats passed by?

A. Yes.

[fol. 1020] Q. And did you observe the action of the water?

A. Yes.

Q. What was the result?

A. The result was that the water was drawn down from normal and then came back above normal.

Q. How high was the surge?

A. The surge was 1.12 feet.

Q. Tell whether or not that boat went slowly or fast?

A. Very slow.

Q. Have you observed the action of the waves with boats going through there at other times?

A. Yes.

Q. What is the effect if the boats go fast?

A. More surge, higher surge.

Defendants rest.

JOHN MCSHEA, a witness produced and duly sworn, examined by Mr. Oviatt on rebuttal, testified as follows:

Q. How old are you?
A. I am 73 past.
Q. Where do you live?
A. I live pretty near two miles west of Charlotte.
Q. On the Latta road?
A. On Dewey Avenue.
Q. How long have you lived there?
A. All my life time.
Q. Were you born there?
A. Yes sir.
Q. As a lad did you used to go down to the place where Ontario Beach Park used to be?
A. Yes sir.
Q. Did you know Mart McIntyre?
A. Yes.
[fol. 1021] Q. Did you go down to his place from time to time?
A. Yes.
Q. How frequently and under what circumstances and what for?
A. Well, as a boy between 16 and 18, along in there, maybe not so old, I used to go down there with three or four boys Saturday afternoons, and go swimming.

Mr. Sutherland: It does not seem to us that this is proper rebuttal. If it is the purpose of the counsel to show by this witness the conditions around the McIntyre place, that is a part of their principal case and we object to the evidence on the ground that it is not proper rebuttal. It is a part of their principal case and we wish to object to it on that ground. It will re-open the whole principal matter on which they had the burden of proof in the first instance, and we have followed with our testimony. They are re-opening the whole principal case here.

Objection over-ruled. Exception.

Q. Tell us now, Mr. McShea, about your going down swimming and how often you went down there?
A. Well, I used to go sometimes once a week, and then maybe would not go again for a month maybe, depends upon the nice weather it was.
Q. Do you remember what existed between McIntyre's shanty and south of it, what was south of the shanty?
A. Why, there was a creek going down through there on the south side of it.
Q. Anything else there?
A. Why, it was flags and brushes.
[fol. 1022] Q. Any water?
A. Yes, water was there.
Q. Now, do you remember any times about the lake rising towards McIntyre's shanty? If you do, tell us what you remember on that subject?

A. Well, I was down there one time, the water was right up to his house.
Q. And what was there south of the shanty then, at that time?
A. All water.
Q. All water?
A. Yes.
Q. Do you remember about when that was?
A. I couldn't tell that.
Q. That was when McIntyre was occupying his cottage?
A. Yes, sir.
Q. Did you know McIntyre very well?
A. Yes, knew him well.
Q. Did you go on a hunting trip with him to Michigan?
A. Yes, sir.
Q. That was after he gave up his cottage?
A. Yes.
Q. And were you there at the cottage at the time the water was there?
A. Yes, sir.
Q. Did you have a conversation with McIntyre about it?
A. Yes, he showed me——
Q. That was all, just the conversation about it, is all I want.
A. Yes, sir.
Q. Do you know about any road that led from Lake Avenue over to McIntyre's cottage?
A. Yes, sir.
Q. And do you know who made that road?
A. As I understood it, McIntyre made it himself.

[fol. 1023] Cross-examination:

By Mr. Sutherland:

Q. What year was that, Mr. McShea?
A. I couldn't tell you anything about the year.
Q. How old are you now?
A. 73 past.
Q. Was this in the year 1870 that you noticed this high water?
A. I couldn't tell you anything about that.
Q. Can't you give us any idea now of when it was you noticed that water?
A. No.
Q. Were you living around there in 1870?
A. I lived all my life time there, yes.
Q. Now, a creek ran to the river?
A. Yes, sir.
Q. South of McIntyre's shanty?
A. Yes, sir.
Q. Or cottage?
A. Yes, sir.
Q. Where did that creek come from?

A. Why, it starts a way up in the country quite a ways, about two miles, I should think, south of the Latta Road, and it was formed in springs, keeps coming down and it is running there yet.

Q. And at times there was high water that came down through that creek, was there?

A. Yes, sir.

A. And when the creek was at a high stage the water from that creek spread out when it got down onto that low land, did it?

A. Yes, sir.

Now, was the creek up high at that the time this unusual condition that you have described existed?

A. Not any more than any other part around there.

[fol. 1024] Q. Was the creek high, was there a lot of water coming down the creek at the time you described?

A. Yes, sir.

Q. Was the river high at that time?

A. Yes, sir.

Q. You know that McIntyre's cottage rested right on the sand, don't you?

A. Yes, sir, on posts or something like that.

Q. The McIntyre cottage itself wasn't under water, was it?

A. Not the whole of it, no.

Q. Was any of it?

A. Why, the water was on the kitchen floor.

Q. Water on the kitchen floor?

A. Not in the barroom.

Q. Not in the barroom?

A. Yes, sir.

Q. What else was there in the kitchen there besides a barroom and a kitchen?

A. I didn't know of anything else; I didn't pay any attention to anything else.

Q. You were just interested in the barroom and the kitchen?

A. Why, he called me and showed me how high the water was, that's all.

Q. Couldn't you see how high the water was without going in?

A. I could look around the house, of course.

Q. How did you get out there that day?

A Walked down along the beach with my bare feet.

Q. How deep was the water where you walked?

A. Well, I didn't measure it at all.

Q. How long did it stay there?

A. Oh, maybe half an hour.

Q. About a half an hour? Then, where did the water go to?

A. Where did the water go?

Q. Yes.

[fol. 1025] Mr. Oviatt: He said how long he stayed there, he said a half of an hour.

Q. Oh, how long did the water stay there?

A. I couldn't tell you that.

Q. Haven't any idea how long it stayed?
A. No.
Q. The river was very high, was it, at that time?
A. Yes, sir.
Q. Was there a pool near McIntyre's house which would spread from the river and from this creek?
A. Why, there was kind of a depression in the dock there, back of there, and he kept boats in it.
Q. Yes, an opening between the slip, for the boats, and the river?
A. Yes.
Q. Through the pier?
A. Yes, sir.
Q. And was the water coming in through that opening into this little pond?
A. Why, yes, it was all up as high as the river along there.
Q. Yes, that's where the water came from that got into McIntyre's kitchen floor, wasn't it?
A. Well, not exactly. It came down the creek, too.
Q. The creek and river?
A. Yes.
Q. Furnished the water that filled up back of McIntyre's cottage and actually got on to McIntyre's cottage floor?
A. Yes, and the lake.
Q. Well, now, why do you say the lake?
A. Why do I say it?
[fol. 1026] Q. Yes.
A. Why, the lake was high, the same as it is.
Q. Wasn't the river higher than the lake at that time?
A. Not very much.
Q. Wasn't there a flood in the river?
A. Why, of course, there was quite a flood, yes.
Q. And when that flood ran down the river it came into the lake, didn't it?
A. Yes.
Q. The flood waters were running into the lake at this time, were they not?
A. Well, they might have been, yes.
Q. And the creek was high?
A. Yes, sir.
Q. And the creek spread out there, didn't it?
A. Yes.
Q. How wide an area did the spread of the creek cover?
A. Why at that time I couldn't tell exactly for the water was both sides of it, you know.
Q. Yes. Was that creek running over Broadway?
A. Why, just across the road there, right there south of McIntyre's shanty.
Q. Did the creek——
A. That's what I was speaking about, the creek.
Q. Did that overflow Broadway at that time?
A. Not that I know of.

Q. Lake Avenue?
A. I couldn't say that.
Q. Don't you remember whether it did or not?
A. No, sir.
Q. You can't give us any idea how long that high water condition lasted?
A. No, I couldn't.
Q. Do you remember anything about high water in the year 1870?
A. No, sir.
[fol 1027] Q. You never saw such high water there before, did you, or since?
A. I don't know whether it was 1870 or what year it was.
Q. Did you ever see such high water in all your life as existed on that occasion?
A. I don't remember whether I did or not.

By Mr. Oviatt:

Q. The lake was high, you say, at this time?
A. Yes, sir.
Q. And the waters of the lake come up from the north the same as the waters from the south from the river, to McIntyre's shanty?

Mr. Sutherland: I object to that as leading, your Honor.
Mr. Oviatt: Maybe it is.
Mr. Sutherland: It leaves nothing to the imagination of the witness.

Q. Do you remember any boats being rowed in back of McIntyre's shanty and outside of this pool along where the creek was and the marsh was?
A. No, but I heard people——

Mr. Sutherland: Well, I object to the talk.

Q. Well, did you see the water in there that they could row boats in?
A. Yes.
Q. And that water was south of the shanty?
A. Yes, sir.
Q. And in this pool, that is, back of the pool?
A. Yes, sir.

Mr. Oviatt: That's all.

[fol 1028] By Mr. Beach:

Q. That might have been the year 1870, might it not?
A. What?
Q. That migh- have been the year 1870?
A. It might have been.
Q. Yes.

By Mr. Oviatt:

Q. Well, did you see it more than one year?
A. Why, there was a good deal of water there more or less all the time.

By Mr. Sutherland:

Q. Mr. McShea, about how old were you when this high water condition occurred that you have been describing?
A. Well, I must have been from 14 to 16, or 17, along there; I couldn't tell you just now.
Q. What is your best judgment now of your age at that time?
A. Well, I don't think I was over 16.

Fred R. Bemish was thereupon called as a witness on behalf of the plaintiff and, being duly sworn, testified as follows:

Direct examination.

By Mr. Oviatt:

Q. Mr. Bemish, what is your occupation?
A. Inspector in the engineering department, City of Rochester.
Q. And how long have you been such?
A. 17 years.
Q. Was there a time when you had something to do with the construction of a sewer located on the south side of Beach Avenue from the river westward?
A. Yes, there was.
[fol. 1029] Q. And what did you have to do with the construction of that sewer?
A. I was inspector on that construction.
Q. And do you remember when it was constructed?
A. Yes, sir.
Q. When?
A. 1921 and '22.
Q. And how far south of Beach Avenue was it?
A. 30 feet south of the south walk line, I believe.
Q. And did it run in a direction parallel with Beach Avenue?
A. Parallel.
Q. How deep did you dig the sewer?
A. Oh, I should say an average of 11 feet.
Q. And in digging the sewer did you pay any attention or notice the materials that came out of it?
A. Yes, I did.
Q. Tell us what they were?
A. Well, for about four feet down there was fill. This is taking 200 feet west of the river.
Q. Yes.

A. That's where I started on it; the other was dug when I got there.

Q. The 200 feet from the river westward——

Mr. Sutherland: He hasn't qualified himself on whether that's fill or not.

Mr. Oviatt: Oh, I would just as soon that characterization weren't involved.

Mr. Sutherland: I think that's going a long ways for an inspector. I object to it. We move to strike out his statement that that was fill.

Mr. Oviatt: That's what the word means, to inspect.

[fol. 1030] The Master: The word inspector means to inspect fill.

Mr. Oviatt: This means excavation. We don't attach any importance to that.

Mr. Sutherland: We ask that his characterization of this ground as fill be stricken out on the ground the witness hasn't been made competent to pass an opinion upon that subject.

The Master: Suppose you qualify him some, ask him what his experience has been.

Q. This material that you characterized as fill, we intend not to accept your characterization at all. Tell us what it was?

A. It was railroad ties, slag, brick-bats, yellow loam, then there was a black streak of organic matter about four feet deep, four or five feet deep along in there.

Q. Now, on top of this black level you found these various things you testified to?

Mr. Moser: He didn't say it was black, he said it was organic.

Witness: Black or organic.

Q. You found this other material on top of this black level, did you?

A. Yes, sir.

Q. Tell us the arrangement or location or general layout of ties and slag that you found there?

A. Well, I started in 200 feet west. There was a line of railroad [fol. 1031] ties in there that looked as if there had been a breakwater or something. They were laid in longitudinal fashion with tie-ins and those ties laid in running south looked as though they had been tied in back to the bank. I judge they run for 150 feet along in there.

Q. And the ties that you say were laid parallel and horizontal, they ran in what general direction?

A. With the ditch.

Q. With the ditch, in the same direction as the ditch?

A. Yes.

Q. For 150 feet?

A. About that.

Q. And then, as I understand it, you say that there were ties tied into these others running north and south?

A. Yes, there was.

Q. And how high, or how many ties deep were those ties that were laid on top of each other and which were in line with the ditch?

A. Oh, I should say two or three.

Q. And what did you do your excavating with?

A. We had a Bay City Industrial Crane with a clamp shell bucket.

Q. Did you have any difficulty with that shovel by reason of these ties?

A. Yes.

Q. What was that?

A. The ones that was running north and south, they would get a hold of the wood and we had to cut them with an axe. It would not pull them, there were so many of them in there.

Q. And you say you started in 200 feet west of the river and there was about 150 feet of this construction that you speak of?

A. That had been dug out. I laid the pipe in it after it had been dug.

[fol. 1032] Mr. Oviatt: Cross-examine.

Mr. Sutherland: That's all.

Mr. Beach: No questions.

GEORGE LOUIS MALONE was thereupon called as a witness in behalf of the plaintiff and, being duly sworn, testified as follows:

Direct examination.

By Mr. Oviatt:

Q. Mr. Malone, you now are, and you have for a period preceding 1921, an inspector in the employ of the City of Rochester and connected with the City Engineer's office, and as such inspector you had something to do with the construction of a sewer running parallel with Beach Avenue, about 30 feet south of Beach Avenue, beginning at the river on the east and running westerly to Lake Avenue; is that true?

A. Yes, sir.

Q. Were you an inspector on that job at the time the job was begun?

A. Yes, sir.

Q. So that you *no* the condition in the sewer while the sewer was being constructed from the point of the river westward?

A. Yes, sir

Q. How deep did you dig the sewer?

A. The sewer at that particular point was about 11½ feet.

Q. Tell us what materials you took out of the sewer, being materials which were not lake sand?

A. There were ties and trees and an old cribbing that was just east of the old pier at the present time, for a distance of about 150 feet [fol. 1033] west of this point there were trees and logs that were taken out.

Q. Yes.
A. And underneath these logs there was what I'd call black soil.
Q. Did you take out any ties?
A. We took out ties, yes.
Q. Whereabouts did you take out the ties?
A. Well, the ties would average—oh, I'd say for 150 feet, from the present pier a length of a 150 feet.
Q. Yes.
A. Ties were taken out.
Q. And did you notice those ties in that first 150 feet laid with any particular regularity?
A. They were laid in reference to direction north and south, and the length of the trench.
Q. And was there any particular arrangement of ties that were laid parallel to the trench?
A. Why, it would be kind of hard for me to say. The fact that our clam-shell that was excavating disarranged these ties, that is, when the clam-shell comes down and takes a bite, it would disarrange them and break them.
Q. And for how great a depth did you find the ties?
A. About 2½ feet. You mean the location of the ties?
Q. Yes.
A. Well, I should say they would average about 4 feet from the top down.
Q. From the top down?
A. Yes.
Q. And did you find any ties perpendicular?
A. Yes, sir.
Q. That is, in a perpendicular position more than one of them to indicate they had been put in there perpendicularly?
A. Yes, sir.
[fol. 1034] Q. What other materials foreign to lake sand did you take out of that sewer?
A. Bricks, limbs of trees, and at one particular point there was something like slag.
Q. Down to what depth from the surface did you find this foreign material?
A. Underneath the ties.
Q. Underneath the ties?
A. Yes, sir.
Q. How deep down underneath the surface was it that you found this black layer?
A. About 5, 5½ feet.

Mr. Oviatt: Cross-examine.
The Master: Will you let me ask him a question, please?

By the Master:

Q. Was this sewer laid generally in the same locality and direction as the old creek that went through there?
A. I just don't know what creek you speak of.

Q. You don't remember a creek that one time ran down through this property and emptied into the river, the Genesee River?

Mr. Oviatt: That was long before his time. You see the tiling was put in there in 1884, long before this gentleman's time.

Mr. Moser: This was 1922, he was speaking of.

Witness: 1921 was when I was on this particular piece of work.

The Master: Yes. This sewer, how long was it altogether, where did it begin and end?

Witness: Why, it begun just south of the present landing of the ferry, and it ran in an eastern direction——

[fol. 1035] Mr. Oviatt: Western.

Witness: Or western direction south of Beach Avenue.

The Master: South of the present Beach Avenue?

Witness: South of the present Beach Avenue to a point about 475 feet west of Lake Avenue, where it turned up in Benaldi Street, and the purpose of putting in this sewer was to take care of the vast amount of water west of Benaldi Street.

The Master: Is that a street in Charlotte?

Witness: Yes, at the present time.

The Master: Do you happen to remember yourself where the opening was in the old pier, and how far it was from what you call the present landing?

Mr. Oviatt: That was long before his time.

Mr. Moser: That was before he was born.

The Master: Was it?

Mr. Moser: Yes.

The Master: When was that pier closed?

Mr. Oviatt: Oh, it must have been in 1884.

Mr. Moser: Forty years ago.

The Master: How was the surrounding land, was it higher or on a level or lower than the place at which you put this sewer?

Witness: Why, I would say it was level.

The Master: About the condition it is in now, wasn't it?

Witness: About the same as it is now outside of the park that is directly south of our sewer, and the present ferry landing where the [fol. 1036] river has cut in, and the city has filled in the past year for parking purposes.

By Mr. Oviatt:

Q. Has the city filled above the level which you excavated for the sewer since then?

A. They have.

Q. So the land now is higher that the land you excavated?

A. Yes.

Q. How much?

A. Why, a rough estimate, I'd say about a foot.

By Mr. Beach:

Q. You knew, didn't you, in years gone by, that there were railroad tracks that crossed over that part where you dug at different points?

A. No, sir.

Q. You don't remember the Baloon Track or the old single track, or any of those things down there?

A. No, sir.

Q. And that there was some testimony that there was a firm foundation put in for these tracks along those points?

A. No, I didn't know anything about that.

By Mr. Oviatt:

Q. Did you find these foreign materials all along the length of the sewer that you described 150 feet west of the river?

A. Yes, sir.

Q. All the way through?

A. Yes, sir.

By Mr. Moser:

Q. What was the name of this street? You say you built this sewer to what street?

A. Benaldi Street.

[fol. 1037] Q. Benaldi Street?

A. That is 475 feet west of the river.

Q. 475 feet? West of Lake Avenue?

A. Yes, sir.

Q. Just at that point there is a valley runs up to the south, isn't there?

A. In back of Kane's Hotel and the buildings on Lake Avenue.

Q. Yes, just about the place where your sewer turns to the south the valley runs up there, a stream?

A. There is a valley directly beyond Benaldi Street up to the railroad track.

Q. Yes, it was the water that came down that you were digging your sewer to take care of?

A. Yes, sir.

Q. A vast amount of water comes down that water course?

A. Yes, sir.

Q. How big was your sewer?

A. The steel pipe was 6 feet, a six foot sewer, and the segment black pipe in the Benaldi Street was 30 inches.

Q. Your main sewer that ran to the river was 6 feet in diamter?

A. Yes, sir.

Q. That ran clear through to Benaldi Street, which is 475 feet west of the river?

A. I say 475 feet, I am not sure where it turned there, but it turned to go up Benaldi Street down to the railroad.

Q. There was a large amount of water coming down through that and flooded that area where you put your sewer, wasn't there?
A. That was why we put the sewer in.
Q. And you put your sewer in to carry off that water?
A. Up near the railroad track.

[fol. 1038] By Mr. Oviatt:

Q. Up near the railroad track?
A. Yes.
Q. There was a depression up there that carried water in a pool?
A. Yes, sir.
Q. And this was to carry the water away?
A. Yes, sir.
Q. How far down south of Beach Avenue was this pool that you were draining at the railroad track?
A. About 2,000 feet.

By Mr. Beach:

Q. You went through a section, as I understood you to say, of black, loamy soil?
A. Black soil.
Q. Black soil, or black muck soil, something of that kind?
A. I just called it black soil because I would not want to say just what it is.
Q. About where the ties were?
A. Underneath the ties.
Q. Right underneath them?
A. Yes.
Q. You didn't observe on both sides as to what the different layers were, that wasn't part of your work?
A. That wasn't part of my work.
Q. You didn't observe that?
A. I observed just what I stated in regard to the black soil. The lower soil that went on across the trench, you could notice it on one side the bank and the other side as we excavated it.

By Mr. Oviatt:

Q. Was the material underneath the black strip different than the material up above?
A. Yes, sir, it was a sort of sand water.
[fol. 1039] Q. And that was different than the material above the black strip?
A. Yes, sir.

By Mr. Beach:

Q. You can't say now whether or not an excavation was made to put those ties in at that time, to lay them regularly, could you?
A. No, I couldn't.

WILLIAM C. GRAY was thereupon recalled as a witness in behalf of the defendants and testified as follows:

Direct examination:

By Mr. Sutherland:

Q. Mr. Gray, there is a series of ponds set back from Lake Ontario in the town of Greece, isn't there?
A. Yes, sir.
Q. West of the Genesee River?
A. Yes, sir.
Q. And how far west of the mouth of the Genesee River is the first of those ponds?
A. The first pond of any size is Round Pond. That's about two miles west.
Q. Are you able to identify where Round Pond is depicted on the document I show you?
A. Yes, sir.

Mr. Sutherland: We offer a deed and attached map from Phelps & Gorham and their wives to Robert Morris, in evidence.

(Whereupon the deed and map referred to were received in evidence and marked, "Defendants' Exhibit Number 39.")

Q. Now, Mr. Gray, will you say whether you can locate Round Pond on the map attached to exhibit number 39?
[fol. 1040-1045] A. Yes, sir.
Q. Where is it?
A. About two miles west, and it is the first discoloration shown on the map.
Q. Yes.
A. Two miles west of the river.

[fol. 1046] Mr. Beach: Now, if your Honor please, I offer in evidence a certified copy, made by the official of the Government, of a map of Charlotte Harbor, being a photostatic copy, dated the 30th of June, 1876; also one showing the condition of the Genesee River Harbor, June 30th, 1873; the Charlotte Harbor of 1888; map made by Captain L. Palfley; and a map dated June 7th, 1875; those being maps on file in the Government office at Oswego.

(Whereupon the maps were received in evidence and marked, "Defendants' Exhibit 40," "Defendants' Exhibit 41," "Defendants' Exhibit 42," and "Defendants' Exhibit 43.")

Mr. Beach: I offer in evidence a deed from Oliver Phelps to Sturgin and Sloan, of date April 18, 1791, recorded in Monroe County Clerk's office, in Liber 1 of the Ontario County Abstracts, [fol. 1047] at page 508. That is a conveyance by Phelps to this grantee of an undivided portion of the Phelps and Gorham Purchase within a year or two after they acquired title, which undivided portion is bounded by Lake Ontario and the Genesee River.

(Whereupon the deed referred to was received in evidence but not marked.)

Mr. Beach: I also offer in evidence a deed from Oliver Phelps to Mary Crosby, of date June 4, 1794, recorded in the Monroe County Clerk's office in Liber 1 of Ontario County Abstracts, at page 59, being a similar deed of an undivided portion bounded by Lake Ontario and the Genesse River; also a deed from Nathaniel Gorham and others, to William Ewing, dated February 6th, 1790, recorded in the Monroe County Clerk's office in Liber 2 of Genesse County abstracts, at page 79, being the conveyance of a similar undivided portion of the premises, including the premises in dispute, which deed describes it as bounded on the north by Lake Ontario, and on the east by the Genesee River.

(Whereupon the deeds referred to were received in evidence but not marked.)

Mr. Beach: And a similar deed from Elias Jackson to Joseph Annin, Sr., dated December 14th, 1790, recorded in Monroe County Clerk's office in Liber 1 of Ontario County abstracts, at page 13.

[fol. 1048] Mr. Abbot: These are all offered as in your chain of title, as I understand it.

Mr. Beach: Oh, yes.

Mr. Abbot: They are offered simply for that purpose, to show your title?

Mr. Beach: They are offered for the purpose of showing that when Messrs. Phelps and Gorham, the moment they acquired this property, made deeds of the property, describing it as bounded by Lake Ontario and by the Genesee River.

Mr. Abbot: We shall, of course, object to that, because Massachusetts wasn't a party to these deeds, and can't be bound in any way by them, or affected by them.

The Master: You don't mean that you object to the interpretation they put upon the deed. That is not subject of discussion, that is a matter of argument.

Mr. Abbot: I don't object to the deeds as simply put in to show his title, but I do object to the offering of the deeds for the broader purpose of undertaking to show a construction by Phelps and Gorham of the grant to them of the Commonwealth of Massachusetts.

Mr. Beach: Well, the deeds will speaks for themselves. I offer them merely as sample deeds. There are a great many undivided portions conveyed by Phelps and Gorham, and I offer them as sample deeds of those conveyances, being in our chain of title, [fol. 1049] which, by agreement which is not yet put on the record, any party may offer any deed in the chain of title in addition to the deeds referred to in the stipulation.

Mr. Abbot: I ask the Court to restrict the presentation of the deed simply for the purpose of showing the transmission of title from Phelps and Gorham to these various grantees.

The Master: Well, I won't undertake to decide what the deeds prove.

Mr. Abbot: I simply wanted to make a timely reservation with regard to that, that we ask to have the deeds restricted to that limited purpose. I understand, where evidence is competent for one purpose and not competent for the other, it is entirely proper to ask that the evidence be restricted to the competent purpose and not applied to the incompetent purpose.

Mr. Beach: That is a question of argument, I think.

Mr. Abbot: If there were a jury in this case, of course, the Court would instruct the jury as to the effect of the instrument, and as to the uses to which they could put it.

The Master: Well, these deeds are in, and we will let the Court determine what significance to give them.

(Whereupon the deeds referred to were received in evidence but not marked.)

Mr. Sutherland: Your Honor, I have an old map here which [fol. 1050] they photographed for me at Washington. The legend on it is, "Accompanying General John J. Swift's Report of 1839." The photostatic copy in the lower half shows the mouth of the Genesee River, the original shore, and the shore in 1838. The upper half of the map refers to Oak Orchard Creek, and I do not offer that upper part in evidence because it refers to another locality. It is the lower half of the map which I offer.

The Master: You put the whole map in, but you call attention to the lower half.

Mr. Sutherland: Yes. It is all one sheet.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit 44.")

Mr. Moser: Now, if your Honor please, Mr. Abbot, at the first hearing, had Plaintiff's Exhibits 5, 6 and 7 marked for identification. I would like to have those marked in evidence.

Mr. Abbot: I think they are all in, aren't they?

Mr. Moser: Well, they are not so indicated in the record. Defendants' Exhibit 2, which was marked for identification, we want marked in evidence as Defendants' Exhibit 2.

(Whereupon the exhibits marked for identification which are above referred to were received in evidence as exhibits with corresponding numbers.)

Mr. Sutherland: I want to be sure that this map, made by Major [fol. 1051] John M. Wilson, Corps Engineer, made June 30th, 1874, is marked in evidence, showing conditions in sea, river and harbor, New York.

(Whereupon the map referred to was received in evidence and marked, "Defendants' Exhibit Number 45.")

Mr. Moser: Now, I want to direct attention and offer in evidence Chapter 283 of the Laws of 1850 of the State of New York, which is the statute authorizing commissioners of the Land Office to make

grants of land under the waters of navigable lakes. Then I offer Letters Patent from the People of the State of New York to Bartholomay Brewing Company, dated October 30th, 1888, recorded in Liber 441 of Deeds, at page 388, in Monroe County Clerk's office, which is a grant of land under water to the Bartholomay Brewing Company.

(Whereupon the document referred to was received in evidence and marked, "Defendants' Exhibit 46.")

Mr. Moser: Now, I am going to offer in evidence some of the deeds in our chain of title. We have made a stipulation with reference to the chain of title, but I am offering these deeds for the purpose and consideration that are recited in them. I offer in evidence a deed from James N. Whitney and wife, to the Bartholomay Brewing Company, dated April 18th, 1885, recorded in Liber 390 of Deeds, at page 354, Monroe County Clerk's office. I am offering copies, with the understanding they may be corrected if they don't correspond to the originals.

[fol. 1052] (Whereupon the deed referred to was received in evidence and marked, "Defendants' Exhibit 47.")

Mr. Moser: Then I offer in evidence a deed from the New York Central Railroad Company to the Bartholomay Brewery Company, dated August 17th, 1915, recorded in Liber 968 of Deeds, at page 246, in the office of the Clerk of Monroe County. That is a conveyance of a one-quarter interest in a small parcel of land.

(Whereupon the deed referred to was received in evidence and marked, "Defendants' Exhibit 48.")

Mr. Moser: Then I offer in evidence a deed from James N. Whitney and wife, to Warham Whitney, recorded in Liber 398 of Deeds, at page 309, in the office of the Clerk of Monroe County. I haven't a copy of that now, but if you will give it a number, please.

(Whereupon the deed referred to was received in evidence as "Defendants' Exhibit 49.")

Mr. Moser: And a deed from James N. Whitney and wife and Warham Whitney and wife, to Charles G. Burnham, dated November 1st, 1886, recorded in Liber 413 of Deeds, at page 365.

(Whereupon the deed referred to was received in evidence as "Defendants' Exhibit 50.")

Mr. Moser: Also deed from James N. Whitney and wife to Charles G. Burnham, dated November 11th, 1886, and recorded in Liber 415 [fol. 1053] of Deeds, at page 94, in the Monroe County Clerk's office.

(Whereupon the deed referred to was received in evidence as "Defendants' Exhibit 51.")

Mr. Moser: And the deed from New York State Realty and Terminal Company to Bartholomay Brewery Company, dated August

17th, 1915, recorded in Liber 968 of Deeds, at page 248, in the office of the Clerk of Monroe County. These four deeds which I have just offered are conveyances of what is referred to as the "Burnham Strip."

(Whereupon the deed referred to was received in evidence as "Defendants' Exhibit 52.")

Mr. Abbot: These are all within the premises in dispute?

Mr. Moser: Yes, they are all within the premises. I just do it for the purpose of identifying the Burnham strip.

The Master: Anything further?

Mr. Moser: We have a stipulation which we have been working on, and I think it is now complete, with reference to the title of the defendants of these various properties.

The Master: Have you agreed on the stipulation, gentlemen?

Mr. Moser: There is the stipulation (handing the Master a copy of the stipulation).

[fol. 1054] Mr. Abbot: I believe that we have, yes, subject to those maps.

Mr. Moser: As soon as that stipulation is signed and offered, we rest, except that I would like to reserve upon the record the right to offer further evidence; that is, we don't want to have the evidence now definitely closed until we gather together what we have here and make sure that the case is closed, and such as that.

The Master: Do you want the same reservation?

Mr. Abbot: Yes.

[fol. 1055] Excerpt from Shepard Field Notes

Defendant's Exhibit 3

Shepard Notes

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Friday 23rd.

Town Plot

Began on the north line of Lot No. 30. (2d division of lots) and at 18.38 E from the N. W. corner of the lot & set a white oak stake mkd N. E. side I-I. and from it ran a line N. 28° E. for the center of a Highway on Main Street 82.25 to the shore of Lake Ontario. The Highway or Main St. laid out 1.50 wide and from the north line of lots No. 30 (the place of beginning) and 0.75 westerly from the center of Main Street set a chestnut post and run N. 28° E. on the easterly line of Lot No. 1 (of the 3d division of lots) 4.41 and set a post then continued the line being the easterly line of the lots and the westerly line of Main Street and set posts with marks thereon representing

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the numbers of the respective lots every 4.00 to the post on the N. E. corner of Lot No. 19 (excepting between Lots No. 10 & 11) where I laid out a cross street at right angles with Main Street 1.00 in width. From the N. E. corner of Lot No. 19 continued the line being the easterly line of Lot No. 20 5.25 to the beach of the Lake where I set an Elm post mk^{d} S. W. No. 20 & S. E. II. from it an ash staddle bears S. 79 W. dist 0.3. mk^{d} 20.

Saturday 24th.

S. Line of *No.* 1

(Pages 31 original notes) Began at the S. E. corner of Lot No. 1. on the westerly line of Main Street and ran N. 62° W. 10.00 on the [fol. 1056] south line of Lot No. 1, and set a chestnut post mk^{d} N. E. No. 1. N. W. Thence run N. 28° E. on the W. line of No. 1 in 3^{d} and No. 29 *No. 29* (2^{d} division) 3.65 to spring ran C^{s} N. E. 9.50 * * *

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set a sasofras Post mk^{d} S. E. No. 1 & N. E. No. 2. and continued the line being the westerly line of the 3^{d} division of lots & set and marked posts at every 4.00 till I came to the south line of Cross Street where I set a chestnut post mk^{d} S. E. No. 10 & N. E. II. Continued the line 1.00 & set a chestnut post mk^{d} S. E. II. & N. E. No. 11, then continued the line & set and marked posts every 4.00 to a chestnut post mk^{d} N. E. No. 20 S. E. No. 19. Continued the line 8.53 to the beach of the lake where I set a chestnut post mk^{d} S. E. No. 20 from which is an ash tree S 1½° W dist. 0.25.

Then on the easterly line of Main Street run N. 28° E. from the north line of Lot No. 30. 2^{d} division 3. 67 & set a chestnut post mk^{d} S. E. No. 40. N. E. No. 39.

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Continued the line & set every 4.00 set and mk^{d} posts (Page 32 original notes) till I came to south line of cross street where I set a W. Ash post mak^{d} S. E. No. 31. N. E. II. then 1.00 for cross street & set a W. ash post mk^{d} N. E. No. 30 & S. E. II. Continued the line & set & mk^{d} posts every 4.00 till I came to the north line of Lots No. 22, where I set a post mk^{d} S. E. No. 22 & N. E. No. 21. Cont'd the line 5.26 to the beach of the Lake and set a B. Ash Post mk^{d} S. E. No. 21. S. W. II. from wh an ash tree bears S. 46° W. Dist. 0.25. retired for the night.

[fol. 1057-1065] Traverse of the Lake Shore of Lot No. 34

1st C^{s} S. 52. E.—15.00.

2^{d} Do. S. 30. E.—15.68 to a chestnut post on the line of the Town Plot & Lot No. 20.

Traverse of Lot No. 20, 3d Division

1st Cs S. 44½° E.—10.94 to the W. line of Main Street & S. E. * * * corner of Lot No. 20.

Thence S. 62° E. 1.50 to the East line of Main Street on the Lake Shore.

Then on the Lake Shore of Lot No. 21 from Main Street East Line.

First. Cs S. 42. E.—8.00.

2d. Do. S. S. E.—7.00 to the traverse of Genesee River & set a stake being at the N. E. corner of the Township.

[fol. 1066] Hon. Jay R. Benton sworn.

Direct examination.

By Mr. Abbot:

Q. What is your full name?
A. Jay R. Benton.
Q. Are you the Attorney General of this Commonwealth?
A. I am.
Q. How long have you been Attorney General?
A. Since January 17, 1922.
Q. Prior to that time were you Assistant Attorney General?
A. I was.
Q. For how long?
A. Since June, 1918.
Q. At sometime when you were Assistant Attorney General was a letter from Rochester received and referred to you by Mr. Allen, the then Attorney General?
A. There was.
Q. Have you that letter with you?
A. I have.
Q. Will you produce it?
A. [Witness produces letter.]
Q. On what date was that received?
A. I received it June 28, but the letter is dated June 24, 1920, and I can not tell just what time Mr. Allen received it. I received it on June 28, 1920.

Mr. Abbot: I offer that letter.

Mr. Sutherland: We object to that letter, in so far as it contains any assertion of fact, and as to those assertions we claim that the letter is incompetent as proved. It is not binding on any one of the other defendants in this case except the City of Rochester, [fol. 1067] in any event, and the other defendants object to it. If the purpose is to show the date when the attention of the State of Massachusetts was called to the possibility of making a claim for this land, it is enough that that is the date when the letter was

received, and if the Attorney General says that the receipt of that letter was what first called his attention to the possibility of making a claim for this land, that is all he has to do. The statements in the letter itself are utterly incompetent.

The Master: The letter may go in, but of course it won't bind anybody except possibly the City of Rochester with respect to any claims of fact or law.

Mr. Sutherland: May we note an exception for defendants, except the City of Rochester? I don't know whether they want an exception or not.

[Letter, June 24, 1920, City of Rochester by Deputy Corporation Counsel, to the Attorney General of Massachusetts, marked "Plaintiff's Exhibit 57."]

[Attorney General Benton is called out of the room for a moment.]

Mr Beach: While we are waiting, I have the discharge of the mortgage from the Rome, Watertown & Ogdensburg Railroad Company, to Farmers Loan & Trust Company, a defendant in this proceeding which defendant did not file an answer. The mortgage was dated July 1, 1874, and recorded in Monroe County Clerk's Office in Liber 186 of Mortgages, on page 1. This certificate by the clerk of Monroe County states that on the 14th day of March, [fol. 1068] 1923, a certificate was recorded in Monroe County Clerk's Office by which it appears that the above mortgage was discharged.

The mortgage to the Farmers Loan & Trust Company, the defendant herein, having been discharged, no answer was filed as it had no interest in that property covered by the mortgage and in dispute in this proceeding.

Mr. Abbot: Are you going to introduce that as an exhibit?

Mr. Beach: No, but if you wish I will read it. [Reads:]

"State of New York,

Monroe County Clerk's Office,

Rochester, New York

"Rome, Watertown & Ogdensburg Railroad Company

to

Farmers Loan & Trust Company

December 20, 1923.

Mortgage given to secure $10,000,000, dated July 1, 1874, recorded July 23, 1874, in Liber 186 of Mortgages, at page 1.

I, James L. Hotchkiss, Clerk of Monroe County, certify that on the 14th day of March, 1923, a certificate was recorded by which it appears that the above mortgage is discharged.

James L. Hotchkiss, Clerk. (Impression seal.)

[fol. 1069] Mr. Abbot: I will take the opportunity to offer the act of 1786, May Session, Chapter 18. I can produce a set of books if the parties desire, but I have had these copies made for convenience. We put it in simply by reference, as we have most of these acts. That will be Plaintiff's Exhibit 58.

[Acts 1786, Chapter 18, date July 5, 1786, authorizing Massachusetts agent to settle controversy with New York State, marked "Plaintiff's Exhibit 58."]

Mr. Abbot: This simply authorizes the Commissioners to enter into the Hartford Treaty.

Q. And that letter was referred to you, I understand, by Mr. J. Weston Allen, then Attorney General, for investigation?
A. That is correct.
Q. What did you do in that connection?
A. The letter was acknowledged, and we called upon the Secretary of the Commonwealth for a report on the matter.
Q. Did you by personal investigation ascertain that the records touching the Hartford Treaty, and so on, were in the office of the Secretary of the Commonwealth?
A. I did.
Q. Is that the place where all the records touching that matter are kept?
A. That is the department of the Commonwealth where the ancient records are preserved.
Q. Was this letter the first information that was received in regard to the fact that there had been or might have been any physical changes on the shore of Lake Ontario, with regard to the premises in [fol. 1070] dispute?

Mr. Sutherland: Received by whom, I submit to your Honor, should be incorporated in that question.

Q. (Continued). Received by the Attorney General, first of all.

Mr. Sutherland: I object to that, on the ground that Mr. Benton can only speak as to his own information, and not the information of anybody else.
Mr. Beach: Or any prior Attorney General.
The Master: I think that is correct, Mr. Abbot. Of course Mr. Benton would not say that this is the first information that anybody in Massachusetts or anybody in the Attorney General's office received in 120 years.
Mr. Abbot: I will ask him.

Q. Have you had investigation made with respect to this matter, as to what information, if any, had been received previous to this letter, regarding any physical changes on the shore of Lake Ontario?

Mr. Sutherland: That only calls for the question whether he had made an investigation, or not. I shall make no objection to that.

A. I have.

Q. What was the result of that investigation?

Mr. Sutherland: I object to that, your Honor, as calling for a conclusion, and because the subject matter of the question calls for a fact which, so far as this hearing is concerned, must be established by records, themselves, and that anything that the witness might say as to what he learned or failed to learn from the records, is [fol. 1071] incompetent in itself, in its nature; that the records themselves are the best evidence that nothing is said in them concerning this matter. Furthermore, the question does not call upon the witness to identify any record, show where it is so that we could trace it, but it is a general summary which reminds us very much of pending proceedings in Washington. It is incompetent, because it does not call for a fact but a general conclusion.

The Master: Well, it is an attempt to prove the negative. I think the objection you make goes rather to the value of the testimony than to its competency.

Mr. Sutherland: The witness is not asked whether he learned of any information coming to the State, but whether any information did come. Isn't that it?

The Master: I think the question really means whether the Attorney General or the then Assistant or Deputy Attorney General, Mr. Benton, in the investigation that he made, found that any information had previously been obtained.

Mr. Abbot: Precisely that.

The Master: I think that question may be answered.

Mr. Sutherland: If we understand it, it is what he found on the subject——

The Master: He can ask first whether he found anything.

Mr. Moser: He is asking what his investigations disclose.

The Master: The same thing as asking if he found anything.

Mr. Sutherland: We take an exception.

A. The search revealed nothing.

[fol. 1072] Q. Where did you have that search made?

A. I had the search made in the files of the Attorney General's office, the files of the Governor's office, by the Executive Secretary to the Governor and Council, the files of the now Department of Public Works, the files of the Secretary of the Commonwealth, and particularly the file known as the Archives.

Q. And none of those searches disclosed any information tending to show that there had been any physical change in the shore of Lake Ontario, upon the premises in dispute?

Mr. Sutherland: Your Honor: I object to that, as involving an implication that in these records had been found something relating to this property. If there is anything of record in Massachusetts as to the sale of the land to Robert Morris, touching any property owned by them out there on the shore of Lake Ontario, I challenge the gentleman to produce it. There is not a line anywhere in all this time. Now, the question as put implies that there

are records concerning this property, but that those records do not disclose the fact that there is any physical change in the condition of things. We object to it because the question assumes that records extant do show something in relation to that property, which is not the fact.

Mr. Abbot: Well, there are numerous records concerning the Hartford Treaty, and what was done with regard to it, at the Office of the Secretary of State, a considerable number of which have been produced in this case by photostatic copies and so forth. So that there are records pertaining to the Hartford Treaty and the prop-
[fol. 1073] erty which was released and conveyed by New York under that Treaty. And what I am trying to show by this question, which I submit is competent, is that there is nothing in those records which shows any physical change in the property, and nothing tending to put us on information that such a change had occurred of any sort, natural or artificial.

The Master: You don't claim, do you, Mr. Abbot, in this case that there are any records in any department of the Commonwealth of Massachusetts since the sale or transfer of this land to Phelps & Gorham?

Mr. Sutherland: And Robert Morris?

The Master: Yes, and Robert Morris,—records which indicate any claim on the part of the Commonwealth of Massachusetts to any of the property in dispute in this proceeding, do you?

Mr. Abbot: I don't contend that there is any assertion or claim.

The Master: Do you claim that there is any record anywhere, in any department of the Commonwealth of Massachusetts, which indicates that the Commonwealth was holding or controlling a claim to any of the land involved in this proceeding, at any time since the transfer of the lands involved in the Phelps & Gorham purchase, or the contract of Robert Morris?

Mr. Abbot: Certainly, because the nature of the conveyance to Phelps & Gorham——

The Master: I am speaking of, since the conveyance to Phelps & Gorham.

[fol. 1074] Mr. Abbot: The conveyance to Phelps & Gorham was of a kind which retained a portion of it.

The Master: I understand that is your claim. But the crux of the case, and what I mean is, do you claim that there is any record showing any assertion of title after the Phelps & Gorham purchase, by the Commonwealth of Massachusetts.

Mr. Abbot: I claim that as the assertion of title to the land.

The Master: Yes, but you claim the record of silence of all these years, as an assertion of that claim?

Mr. Abbot: I claim that. Put it this way: If A owns Black acre and conveys half of it, it seems to me he still asserts his claim to the other half. He does not have to go around every so often and say, "I only conveyed half of Black Acre, and therefore own the other half."

The Master: That is true, of course, but if the half acre claimed not to have been conveyed rested in that status for a great many years, and A was seeking to show that he did not know, and that his records and books and documents did not prove, that he knew there was any change in the physical condition of that part of the land, not conveyed, he would not seek to prove it, would he by saying that as a part of the record with respect to the part not conveyed it did not appear that A knew there had been a physical change there; because that does imply that there was some record being kept which indicated that A was keeping track of that property not conveyed, and this bit of information had never come to his [fol. 1075] attention. It appears here that there were not any records at all of any kind.

Mr. Abbot: Pardon me. All the transactions in regard to this property were placed on record in the office of the Secretary of State, in the Archives. There is the Hartford Treaty. There is the Phelps & Gorham conveyance. There is the contract with Robert Morris, and so on down the line. Those were placed on record, there, and——

The Master: But from the time these were placed on record until June 24, 1920, or the 29th of June, 1920, when this letter was received, do you claim that there is anywhere in any department of the Commonwealth of Massachusetts any record referring to this letter?

Mr. Abbot: That is, to the premises in dispute?

The Master: Yes.

Mr. Abbot: We have not found any so far as I know, except, as I say, as those records are there, the conveyance——

The Master: That is the data we started from.

Mr. Abbot: Exactly. But that is itself a record.

The Master: But I am talking about any record made between the time of the transfer or conveyance claimed by defendants here, as to which I am not expressing any opinion, and the date of this receipt of this letter of June 24, 1920.

Mr. Abbot: So far as I know, there was no occasion for any.

The Master: Of course that may be.

Mr. Abbot: Yes.

[fol. 1076] The Master: That does not answer the question.

Mr. Abbot: You will remember also that the treaty itself provided that no adverse claim shall be judged a disseisin of Massachusetts. And those conveyances to Phelps & Gorham, you will remember, were likewise recorded in the office of the Secretary of State of New York.

The Master: Yes. And from that date to June 24, 1920, the page is a blank.

Mr. Abbot: No further action has been taken in regard to that, so far as I know, because this letter, we shall contend, is the first intimation that called for action on our part.

The Master: Then this letter was the first intimation, as you claim, that Massachusetts had that there was any such claims to the——

Mr. Abbot: No. No, your Honor. It was the first intimation that there had been any change in conditions which called for action by Massachusetts. Your Honor will remember that the Phelps & Gorham conveyance is bounded, we say, upon the shore.

The Master: Yes.

Mr. Abbot: And that under that conveyance, Massachusetts retained the shore and the bed of the lake. This is the first intimation that we received that there had been any change in connection with that shore which involved further assertion, or made it necessary for us to take action to assert our rights. If the premises remained exactly as they were, there was nothing for Massachusetts to do. She had recorded her conveyance here and recorded it in New York, and she was protected from any claim of adverse possession.

[fol. 1077] [The question is read as follows: "And none of those searches disclosed any information tending to show that there had been any physical change in the shore of the Lake Ontario upon the premises in dispute?"]

The Master: I think I will let him answer that.

Mr. Sutherland: Exception.

A. Nothing was disclosed to that end.

The Master: None of those searches disclosed anything on the subject at all, did they, Mr. Attorney General?

The Witness: That is correct, as to this particular locus.

Q. Did they disclose any information tending to show changes in the shore elsewhere than in the locus?

Mr. Sutherland: I object to that on the ground that the record should be produced. If there is a record relating to the shore of Lake Ontario, we demand that the record be shown, and we claim that there is no record in existence, showing that the Commonwealth took official cognizance or interest in that section at all, after the sale to Phelps & Gorham, and Robert Morris. There is not any on record. If they claim there is a record from which an inference can be drawn one way or the other, that record should be produced.

The Witness: May I suspend? Governor Cox has arrived.

[fol. 1078] Governor CHANNING H. Cox sworn.

Direct examination.

By Mr. Abbot:

Q. Your name is Channing H. Cox?

A. Yes.

Q. And you are the Governor of the Commonwealth, at the present time?

A. I am.

Q. Sometime in February, 1921, did you receive a letter from the Department of Public Works of the City of Rochester?

A. I did, a letter dated February 16, 1921, which was probably received the next day. It was received, I find from my record, on February 17.

Q. What did you do in connection with that letter?

A. I replied to it.

Q. Did you take up the matter with the Attorney General at that time?

A. At that time, and as I remember, some representatives from the City of Rochester came to see me in company with the Attorney General of Massachusetts, and after receipt of the letter from Mr. Pierce I then conferred with the Attorney General and replied to Mr. Pierce, and directed the Attorney General of Massachusetts to do certain things.

Q. Was that the first action, when the matter came to your attention, so far as you know?

A. I think that representatives from the Public Works Department of Rochester came to my office at about the time that this letter was received. I had known in a general way of the possible claim that Massachusetts had, for some time, but this was the first time that it was brought before me in any formal way, through our Attorney General.

[fol.1079] Q. Did that information come through the Attorney General?

A. Yes, or some of his assistants.

Q. That is, through the Attorney General's department?

A. Yes, his department.

Mr. Abbot: Let me say that these two letters dated February 16, 1921, were sent, one to the Attorney General's department, and one to the Governor. It is directed to the Commonwealth of Massachusetts, the General Court, and to His Excellency Channing Cox, and so on. I offer that letter.

Mr. Sutherland: We object to that on the same ground as before, your Honor.

The Master: It may go in, subject to your exception.

Mr. Sutherland: Exception.

(Letter, February 16, 1921, Commissioner, Department of Public Works, Rochester, to the Commonwealth of Massachutts, et al., marked "Plaintiff's Exhibit 59.")

Mr. Abbot: May I state for the purposes of the record that this Exhibit 59, which I am offering and which was received at the Attorney General's department, is identical with the letter of February 16, 1921, to the Governor, to which Governor Cox has testified. I am putting in one letter to represent both.

The Master: Very well.

Q. Did you, on February 23, 1921, write a letter to the then Attorney General directing him to prosecute the present suit?

A. I did. This is the letter [producing letter.]

Mr. Abbot: I offer that letter also.

[fol. 1080] Mr. Sutherland: We object to this as immaterial.

Mr. Beach. It is simply authorizing the Attorney General to proceed. We don't contend that the Attorney General started it without express authority.

The Master: I think it is admissible and it may all go in, although I don't see any particular purpose served. Suit was brought and how it happened to be brought and the correspondence between the Attorney General and the Governor, and the interest of the Rochester officials I think may be assumed. Still, if the counsel for the Commonwealth want to put it in, it may be admitted.

Mr. Sutherland: Exception.

Mr. Abbott: I will have that letter marked. I think I have no other questions for Governor Cox.

[Letter, February 23, 1921, Governor of Massachusetts to Attorney General of Massachusetts, marked "Plaintiff's Exhibit 60."]

Cross-examination.

By Mr. Sutherland:

Q. Just a question or two, your Excellency. You stated that you had known for some time before February 17, 1921, concerning the possibility of a claim by the Commonwealth of Massachusetts upon the land in question in this suit. Will you tell us what you mean by the expression "for some time"?

A. I ought to say that I have not any very definite recollection as to the date, but as I recall it, during my term as Lieutenant-Governor, in 1920, while Mr. Allen was Attorney General, that in conversation he referred to the matter, at that time I think he [fol. 1081] spoke of it as a very interesting discovery which he had made, and that probably Massachusetts was going to acquire unexpected wealth because of ownership of this land in Rochester.

Q. Governor, we have the statement of Attorney General Benton, made this morning, that the first advices which he had with reference to it were in a letter of June 24, 1920, received June 29. That is marked Plaintiff's Exhibit 57. Before the date of that letter, had you any information or intimation from anybody, that Massachusetts had or claimed to have any interest in any land at the mouth of Genesee River?

A. That was in 1920?

Q. Yes, 1920.

A. I should be unwilling to say that I had learned of it.

Q. Is it not probable that the conversation which you recall was subsequent to this letter received by the Attorney General?

A. I should say so.

Mr. Sutherland: That is all, I think.

[Witness excused.]

Hon. JAY R. BENTON, resumed.

Further direct examination by Mr. Abbot:

Q. After receipt of these letters, Mr. Benton, did you go out to Rochester, to investigate this matter?

A. I did.

Q. October, 1920?

—. ——.

Q. At that time, in Rochester, did you take steps to bring to the [fol. 1082] attention of the Commission or Committee that was conducting proceedings for the condemnation of this land, the claim of the Commonwealth of Massachusetts?

A. I did.

Q. And thereafter the present suit was brought?

A. That is correct.

Q. Will you describe what steps you took in——

The Master: What is the purpose of all this? I don't see how it proves the title or affects any issue in the case.

Mr. Abbot: I want to show that as soon as we learned of the situation calling for action, we took action.

The Master: You took action: That is the best known thing in this case. The record is full of it, and suit was brought, and I think we are taking up a lot of time for nothing.

The Witness: I think the Master will be interested in one step which we tried to take.

The Master: What is that, Mr. Attorney General?

The Witness: We took one step which it seemed to me is of some moment, to protect the interest of the Commonwealth. When I went out there in October, the then Attorney General suggested that we should have eminent local counsel that would adequately protect the Commonwealth on the local end, and the first gentlemen I was ordered to see — Judge Sutherland. But he was unable to put in his appearance for the Commonwealth because he represents, as we now know, the Ontario Beach Hotel & Amusement Company.

Mr. Abbot: That is all, I think.

[fol. 1083] Cross-examination.

By Mr. Sutherland:

Q. Mr. Benton, you asked the Secretary of the Commonwealth to examine all of the records which he could find, did you not, to see if on those records anything had been entered relating to the property in question, or any right of Massachusetts to any land under the bed of Lake Ontario, after the Phelps & Gorham and Morris deeds were made?

A. The inquiry to the Secretary of the Commonwealth covered different periods and covered different phases. The first inquiry was, of course, for a broad investigation of all the records to give us the history of this change at the mouth of the Genesee River.

That was back in 1920 and the months following. Recent inquiry has been made through these various departments of the Secretary of the Commonwealth, to determine particular questions whether there were any records showing that the Commonwealth, prior to the June, 1920, letter, had any intimation that there had been a change in the physical acreage of the property at the mouth.

Q. Did you make inquiry to determine whether during that period anyone in Massachusetts representing the Commonwealth was taking official cognizance over the alleged land on the shore of Lake Ontario?

A. No, no inquiry was directed to that question.

The Master: The land is not alleged, it is—the claim may be, but the land is not?

Q. Is there any record, Mr. Benton, that you know anything about, made after the Phelps & Gorham deed and the Robert Morris deed, on the books of Massachusetts, with reference to any remaining existing right in any of these western lands, whether [fol. 1084] under water, or out of water?

A. Yes.

Q. And what is that and where is the record?

A. There are certain papers, letters with certain claims as to Indian lands.

Q. Indian reservations within the general body of the upland?

A. Yes, and there was some question that came up about lands which had to do with Indians, in the bed of the Allegheny, around Salamanca.

Q. There is the reservation of Salamanca which required some action by Massachusetts before the title could be given to it. Now, is there anything, in any record, made after the Phelps & Gorham deed referring to any existing right of Massachusetts in any of the land under Lake Ontario, north of the Phelps & Gorham purchase?

A. There is. There are lands west of this locus which were conveyed to one Ogden subsequent to the conveyance to Phelps & Gorham, where the northern boundary was fixed at the international boundary line, out in the lake.

Q. The deed to Ogden runs to the middle of the lake, so far as the exterior boundary is concerned?

A. Yes.

Q. Is there anything aside from that anywhere in the records of Massachusetts concerning any claim or reservation of claim on the part of Massachusetts to any of the land under Lake Ontario north of the Phelps & Gorham purchase?

A. Nothing has been discovered since the conveyance to Phelps & Gorham, on the northern boundary.

Q. Have you made any examination or caused any examination to be made, of the records or reports of the Land Agent of the Com- [fol. 1085] monwealth of Massachusetts, who by Chapter 103 of the Laws of 1859 was directed by the Legislature—was empowered to take charge of all the lands, flats, shores and rights and tidewaters belonging to the Commonwealth, except the Back Bay lands and

other lands and rights now by law provided for, and upon whom the duty was cast to ascertain the extent of such property, and to ascertain whether there was any encroachments or trespassers upon any such properties, and to report concerning such encroachments or trespassers, to the Legislature; have you ascertained or caused to be ascertained, whether the Land Agent acting under that affirmative duty, created by the Laws of 1859, Chapter 103, made any reference in any of his reports to any land on the shore of Lake Ontario?

A. To this extent; when I came into office I designated Mr. Abbot as special counsel and directed him to make full search and investigation of all these documents, and of all documents in our files and in files outside the State. As to whether or not he has covered this subject matter of your question, I am not informed.

Q. The rights and responsibilities and duties of the Land Agent were transferred later, were they not, to what was called the Board of Harbor and Land Commissioners? Isn't that the name of the body that took over the duties of the Land Agent?

A. I am not advised as to that.

Q. Yes, I have got it here—Board of Harbor and Land Commissioners. Did you have any search made of the records or reports of the Board of Harbor and Land Commissioners, to see whether [fol. 1086] that Board in those reports or records took any official cognizance of any land under or out of water on the shore of Lake Ontario?

A. I did; yes.

Q. Was there any reference to it in any of those reports?

A. No, the Board that you refer to is the now Department of Public Works, and that is one of the bodies that I make inquiries through, and they reported that they found nothing.

Q. Does the present division of your Board of Public Works which has jurisdiction over that subject, have in its possession the records of the proceedings of the Board of Harbor and Land Commissioners, and its predecessor, the Land Agent?

A. That is correct.

Q. Those records are all now in the Department of Public Works, in the division thereof which has jurisdiction over shore properties and such?

A. That is correct, assuming that the Department of Public Lands took over the duties of this Land Agent to whom you refer.

Q. That is my assumption. I was not able to find the connecting link this morning, in the library, but that is my assumption from looking through your various revisions of statutes.

A. If the fact is that they took that over, then those papers would be in the files of the Department of Public Works.

Q. Do you know of any other department, Mr. Benton, where one would naturally look for any record of any official action taken by any board or officer of the Commonwealth, with relation to any property under the waters of Lake Ontario or on the shore of that [fol. 1087] lake, except the offices or places of record which we have

referred to here this morning? Is there any other place where we should go and look?

A. None that I can think of as a logical place to search for those records.

Q. In all your search, you have found no affirmative reference to any remaining rights in the lands under the Lake Ontario, after the conveyance to Morris or Ogden of the lands lying west of the Phelps & Gorham purchase, have you?

Mr. Moser: Or on the shore of Lake Ontario.

Q. Or on the shore of Lake Ontario?

A. That is correct.

Mr. Moser: I think that covers the subject.

Mr. Sutherland: I have no further questions.

[Witness excused.]

General FREDERIC V. ABBOT recalled.

Direct examination.

By Mr. Abbot:

Q. General, have you at my request taken several of the maps which have been offered by the defendants in this case, and made a composite map showing certain of the information contained in those maps?

A. I have.

Q. Is that the map in question [showing white paper map to witness]?

A. That is the map in question.

Q. Will you explain what steps you took in order to combine those maps?

A. The maps which were available, were of various scales, and sizes, making it extremely inconvenient to compare the contents. [fol. 1088] I had the maps reduced to a common scale by the photostatic process, the most accurate method of producing a map of a different scale from the original, and from the photostats thus prepared I had a tracing made by a skilled draftsman under my immediate personal supervision, and from that tracing these prints were made. The photostatic work was done under my immediate supervision in this building, and is thoroughly accurate. Of the tracing I have seen every line made, and it is a correct representation of the phtostatic copies from which they were traced. Their relative position was determined by getting points on the various maps which were in common and making a superposition *which were in common and making a superposition* of the tracing over the corresponding map, so as to be sure that the relative position of the different lines as shown on this black and white print, were as correct as it is humanly possible to do such work.

Q. What maps have you put together in this map which you have prepared?

A. The Guthrie map of 1909, the Wilson map of 1873, the Robert map of 1885, the Maurice map of 1829, and Peites map of 1824.

Q. And those are indicated upon the map itself, with a proper caption to indicate what lines come from what map?

A. Yes, both in color and in the designation of line, although any line can be identified on the map with the authority upon which it is based.

Q. Did you place upon this map also the McIntyre ditch as represented on Mr. Gray's map of 1923?

A. I did, as closely as it was possible to make the addition. It is [fol. 1089] within a very few feet of right.

Mr. Abbot: I will offer this map in evidence.

Mr. Sutherland: We object to it now, your Honor, as not yet qualified. These added lines, large added lines, have not yet been qualified or shown to be as the condition was at any particular time.

Mr. Abbot: Let me put a question or two in regard to that.

Q. What do these alternate red solid and dotted lines represent?

A. They represent the contours as determined by the Pits.

Q. And from what did you get those lines?

A. From the map submitted by Mr. Ferguson.

Q. From the Plaintiff's Exhibit 54?

A. Yes.

Q. And that Plaintiff's Exhibit 54 you reduced in the same way that you reduced the other maps?

A. Yes, sir.

Q. And the lock lines were taken from that same map, the lock lines of Locks 20 and 21?

A. The lock lines of Locks 20 and 21 were taken from the Vedder map.

Mr. Sutherland: He has not said what he tried to indicate by the solid red lines.

The Witness: The red lines are the lines of the pit; the dotted line being the fraction of the foot and the solid line being the even foot.

Mr. Abbot: I now offer that map.

Mr. Moser: There are four lines on it which you have not identified. The 1884 line, the 1870 line, and the two 1844 lines have not been identified.

[fol. 1090] Mr. Abbot: They are identified by the caption on the map.

Mr. Moser: No. There is another 1844, and one of 1870, and one of 1888 not identified or described by the witness. Another thing on the map not identified by the witness is a line designated here as being "Sand Beach".

The Witness: That is taken from the original Maurice map, and it is shown by the heavy line there, marked "Maurice, 1829" written directly on the face of the print.

Mr. Moser: Those words "Sand Beach" then, do not apply to the land under it, but to the space——

The Witness: No, that is the line on the original plan.

Mr. Moser: Sand Beach is along here, as though it applied to that line, while on the Maurice map it is written over here.

The Witness: "Sand Beach" does not mean this line here at all.

Q. What do you mean by "this line here"? Will you identify it on the map?

A. I refer to the Shepard line; "Sand Beach" is written over it.

Q. Does this black dotted line which appears approximately in the middle of the Sand Beach—what does that refer to?

A. The caption on the map shows that it is the "1803 Shepard line from Vedder map 1916-1920".

The Master: I don't see any reference to the Shepard line.

The Witness: It is marked by arrows. To avoid getting the caption so big that you could not use it I designated some of the authorities on the body of the map. The effort was to make the map in a way which would show the authority at every point, and [fol. 1091] at the same time be convenient to use and not confusing.

Q. And the words "Sand Beach" upon this map, were intended to represent the same area which appeared on the Maurice map of 1829, indicated as "Sand Beach"?

A. Absolutely.

Q. Now, you have referred to a Pettes map. I show you a photostat of it and ask you where you obtained it?

A. In the office of the Chief of Engineers, United States Army, Washington, D. C. It was originally on a single sheet, these three photostat sheets, related to each other as they are on this pasted copy; so that those three maps are on a single sheet in the office of the Chief of Engineers.

Q. For the purpose of the record, simply, will you describe what you mean by "these three maps"?

A. The "Mouth of Genesee River 1828 from a survey made by Capt. T. W. Maurice, Corps of Engineers"; the second is the "Mouth of Genesee River 1844, from a survey made by Wm. H. Pettes, U. S. Agent;" and, third, the "Genesee River harbor, 1874, from a survey made by Major John M. Wilson, Corps of Engineers." The Pettes map is the one which was not in evidence, but the Pettes map is in the Chief of Engineers' office on the same sheet of paper with the other two.

Q. That is, with the Wilson and Maurice maps?

A. Yes, it is a comparative map.

Q. All these three maps that you have just referred to were on one sheet, then?

A. Yes, on one sheet.

Q. And all on the same scale?

A. All on the same scale.

Q. Is that the same scale as the map which you have prepared?

A. Yes, barring possible expansion and contraction of the paper in

[fol. 1092] the photo processes. I adopted this as a base map in making my comparative map.

Q. On each of these maps the scale is contained with the photostat?

A. Yes.

Q. And you procured, yourself, this sheet containing the three maps to which you have referred, from the Chief of Engineers' office?

A. Yes, and while they are pasted together here, they are on a single sheet in the Chief's office.

Mr. Sutherland: All right.

The Witness: And in order to get the scale of the proper size I had three photostat prints made of the three different parts of that sheet.

Q. And then had them pasted?

A. Yes. The pasting was not done with any great reference, because they are independent maps, but they are practically the same position that they were in the original.

Mr. Abbot: I will offer the composite map first.

[White print "Comparative surveys mouth of Genesee River, N Y., compiled 1923, by Col. Frederic V. Abbot," marked "Plaintiff's Exhibit 61."]

Mr. Abbot: I offer the Pettes map, and for that matter the entire sheet.

[Photostat, comparative map in three parts, including survey by William H. Pettes, 1844, marked "Plaintiff's Exhibit 62".]

Mr. Abbot: Now, with regard to the composite map I notice that you have a green line marked 1873. What does that represent?

[fol. 1093] The Witness: The Wilson map of 1873.

Q. What does that represent upon that Wilson map?

A. It represents the position at which the lake and the land met at the time of the survey.

Q. What does the orange line, marked 1885, represent?

A. That is a similar thing with reference to the Robert map of 1885.

Q. There are certain straight black lines marked respectively 1844, 1870, 1888, 1896, 1902. What do those represent?

A. Those are the Guthrie maps of 1909.

Q. And those lines represent the points at which land and water——

A. Where they met at the time of the surveys.

Q. As indicated on that map in those years?

A. Yes.

Q. Now, there is a solid line 1844 and a dotted line 1844.

A. The solid line refers to Guthrie and the dotted line refers to Pettes, showing that the shore line in 1844 was represented differently on those two maps. When you can not make maps

reconcile, you have to show the difference. That is an illustration of it.

Q. Now, you state that you used the Pettes map of 1844 as one of the steps in correlating these several maps.

A. I did.

Q. Will you explain that?

A. The map of 1844 contains on it the jetties as constructed, and likewise the shore line in 1828 on the same sheet. That enabled me to place on my comparative map the jetties with correct geographical position to the earlier maps on which the jetties were not shown. On all subsequent maps the jetties are shown and that gave a very [fol. 1094] fine comparison to get the maps superposed. This map here was necessary in order to step back to the earlier maps and get them on the comparative map in absolutely correct reference to the other maps which I had.

Q. Whether or not the reason for that was that on the Maurice map of 1829 already in evidence, the jetties there represented were contemplated jetties which do not correspond with the jetties as actually built?

A. That map shows the proposed jetties which are entirely at variance in direction from the jetties as actually constructed. The 1844 map gives me the means of stepping back to the earlier maps because it contains both the original shore lines in 1828, which is the same as in 1829 shore line shown on the maps to be the same, and the jetties as actually built. That gave a perfectly reliable means of stepping back.

The Master: When were the jetties built?

The Witness: In the late thirties sometime. I have the record somewhere but not in my mind. Their construction was very much interfered with by very high lake levels shortly after they began. I should say is was 1833 or 1834, but I have not got the data with me. It is all of record in the reports of the Chief of Engineers.

Mr. Sutherland: We have the record.

Q. Did you, taking the map of the mouth of the Genesee River, 1828, from a survey by Captain T. W. Maurice, compare that with the 1829 Maurice map already in evidence?

A. I did, and they are the same, with the addition of a set of proposed jetties on the 1825 map which were added to a copy of the map of 1828, as the original project for the improvement of the [fol. 1095] Genesee River mouth.

Q. Now, taking these various War Department maps which have been put in evidence, and to which you have referred, the Guthrie map, the Wilson map, the Robert map, the Maurice map, and the Pettes map; can you say from your knowledge of the methods of the engineer department what the purpose was of indicating the line at which land and water met at different times?

A. Yes.

Mr. Sutherland: Wait a minute. I think we should object to that. It is the conclusion on the part of the witness, and no suf-

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ficient foundation laid here to enable the witness to express an opinion on it, and it is incompetent generally.

Mr. Beach: The map speaks for itself.

The Master: I don't see but that this witness is competent, from his qualifications which have already appeared, to state whether or not in the practice of the engineer department of the United States Army there is significance to be given to the shore lines as appearing on the map. I think you may answer.

Mr. Sutherland: Exception.

Mr. Beach: Exception.

Q. What is that practice or purpose.

A. The question has now got mixed in my mind, and I don't know what I am answering.

[The last answer by the witness is read by the reporter.]

A. It was to develop the effects produced by artificial structures built by the engineer department as a guide to any future additions or changes which might be advisable from the engineering point of [fol. 1096] view.

The Master: In other words the War Department was, by means of these surveys and maps from time to time, keeping a record of the changes in the water line as produced or affected by Government constructions?

The Witness: With a view to seeing whether our plans require addition, subtraction, or multiplication to produce the result we wanted, which was deeper water at the entrance to the Genessee River.

The Master: The purpose being generally to see what was the effect of these structures upon navigation?

The Witness: Exactly.

Q. What does that line of demarkation between land and water represent? On inland waters, rivers and lakes, it represents the absolute position of that line of junction at the time of the survey. On the seacoast it does not. We put both lines on the map. Where you indicate mean high and mean low water, you can not reduce soundings taken at one time to what it would be at mean lake level, because we don't know it at the time the survey is made. So we put down on the map where the actual junction between land and water took place at the time the survey was made. It is a historical record and the position is not changed to show what it would be at some other later time.

The Master: It is an arbitrary line of the conditions?

The Witness: It is an arbitrary line of the conditions as they exist at the time of the survey.

Q. Whether or not that line was materially altered depending [fol. 1097] upon whether the lake was high or low at that time?

A. It would be very much further out in the lake at low lake than at high.

Q. Whether or not in interpreting these lines it would be necessary to know the time when the survey was made and the height of the lake?

A. Absolutely. Therefore this comparative map of mine does not contain the necessary data to show what lake levels any one of those lines compared with, because the date of the survey was not on the original map in most cases.

Mr Beach: That is, the month?

The Witness: Yes, the month. We can guess the month. In some maps we know the month when the report was submitted, like the 1829 and 1828 maps. The jetties were put on that map in 1829, and the water was put on from the survey of the year before, 1828.

The Master: The water-line?

The Witness: The water-line and the soundings. So that the date of the survey is a necessary thing if you are going to study very closely for quantities of fill or yards of cut. You have got to know the absolute division.

Q. And you say those were not disclosed?

A. Those were not disclosed by the maps to which I was limited here, because they are those already put in evidence.

Q. Whether or not the War Department in making these maps had any particular interest in what laid behind, on the shore, back of the line where land and water met?

A. No, except for convenience of a person going down to in- [fol 1098] spect—it was convenient to see that there was a house or something of that kind in the general direction, that he wanted to go. But for engineering purposes everything above the shore-line as shown on the map is of little importance, and consequently accuracy may well be regarded as nowhere near as good as outside the line. Outside the line is right; inside it may be approximate, although very generally very nearly right.

Q. For example, do any of these maps indicate what the height of the shore was at any given time?

A. The height of the shore is very indefinite.

Q. Well, the height of the——

A. There are no contour lines, if that is what you mean, shown on any of the maps in question on the shoreward side of the line defining the meeting of the lake and beach.

Q. For example, taking this Pettes when that survey was taken.

A. There are two water-lines on that map, but nothing to show the height of the territory lying between the shorelines of 1828 and the shortline of 1844 as shown on that map; the only indication being that the area which I have described was above the lake level at the time the survey was made in 1844.

Q. And that is all that can be said as to any of the maps?

A. That is all that can be said of any of them because they have no contour lines to indicate anything else.

Q. Now, I notice upon the Maurice map of 1829 already in evidence, we have the description in two places "Shall marsh" in one

place, and "Extensive marsh" in another place; one on one side of the river, and the other on the other side.

[fol. 1099] A. Yes. The "Extensive marsh" being to the eastward.

Q. Do you find any such indications on the map of 1828?

A. I do not.

Q. Is that any indication that there were not any marshes?

A. No, no indication at all; because Maurice was not making a survey of the land, but making a survey of the water.

Q. Now, there is no indication of marsh on the Pettes map of 1884?

A. None

Q. Is that any indication that no marsh existed there?

A. None.

Q. And is the same true as to the 1874 Wilson map of this same sheet?

A. Yes.

Q. What in your opinion, General, would be the best indication of the height to which material was naturally deposited so far as you have examined the evidence in this case?

Mr. Sutherland: I object to that as substituting entirely the mind of the witness for that of the referee in this case. I think it encroaches too much on the duty of the Court, to say what evidence in this case ought to be most persuasive to the Master as to what the height of the sand was at a certain time.

The Master: He is not asking what the height of the sand was. He is asking this engineer as I understand it what would be the best indication on which engineers could rely, as to the height to which, by the action of the water, wind, waves and so forth, the land would naturally grow out by accretion into the lake. I think he may answer.

Mr. Sutherland: If the witness answers your Honor's question, [fol. 1100] there would be no objection.

[The question of the examiner is read.]

The Master: I think that is on the borderline, or perhaps over, but I will let him answer that.

Mr: Sutherland: Exception.

A. I will say it was determined by what was found in the pits.

The Master: That is your opinion of the best evidence?

The Witness: Yes, that is my opinion. That is a record of what showed up.

Mr. Abbot: That is all.

Mr. Sutherland: I don't know of any question that I want to ask him, but we will confer this noon and see if there is any question we want to ask him. We will reserve the right to cross-examine after lunch.

[The witness was present during the afternoon session, but was not further interrogated, and was excused.]

Mr. JOHN N. FERGUSON recalled.

Further direct examination by Mr. Abbot:

Q. Mr. Ferguson, in connection with the digging of the pits upon the premises, did you take samples of the material in those pits
A. I did.
Q. Have you samples of the material in the pits on the Bartholomay premises?
A. Yes [producing a number of vials].
Q. Were those samples personally taken by you?
A. They were.
[fol. 1101] Q. Have you a sample taken from Pit No. 8?
A. I have.
Q. How is that marked—is it S1?
A. It is marked No. 8 S1.
Q. From what portion of Pit No. 8 was that taken?
A. It was taken from the northerly end at about elevation 249.6.
Q. When did you take those samples?
A. August 16.
Q. They were all taken at some time in August, 1923?
A. Yes, they were all taken at some time in August, 1923.
Q. Is this from trench No. 8, marked "S1" taken from that portion of the trench which you have indicated on your plan as from the portion described by you as "Loamy sand"?
A. Yes.
Q. From about the middle of that marked "Loamy sand," Plaintiff's Exhibit 27?
A. Yes.
Q. Now, Pit 29. Have you a sample taken from that?
A. I have.
Q. From what portion of the pit?
A. From the northerly end at about elevation 249.6.
Q. And is that from the portion marked "Sandy soil, some gravel," on Plaintiff's Exhibit 50?
A. [Examining plan.] Yes.
Q. Now, Pit 28: Have you a sample from that?
A. I have.
Q. From what part of the pit was that taken?
A. From the southerly end at about elevator 248.
Q. In the portion of the pit cross-section, Exhibit 41, called by you "Loamy sand and clay"?
A. Yes, sir.
Q. Pit 32. Have you a sample from that?
A. I have.
Q. From what portion of the pit was that taken?
A. At the northern end, at the elevation about 249.4.
Q. Was that sample from Trench 32, taken from the portion [fol. 1102] which you have marked on your diagram, cross-section "Loamy sand and clay"?

A. Yes.
Q. Pit 34: Have you a sample taken from that pit?
A. Yes.
Q. From what height?
A. About elevation 248.3.
Q. At which end?
A. The southerly end.
Q. Is that taken from the portion marked "Loamy sand and clay" on your cross-section, Exhibit 35?
A. Yes, sir.
Q. Pit 33: Have you a sample taken from that pit?
A. Yes.
Q. At what height and from which end?
A. From the northern end at about elevation 248.6.
Q. From the portion marked on your cross-section, Exhibit 36, "Loamy sand"?
A. Yes.
Q. Have you a sample from Pit 44?
A. I have not.
Q. Have you a sample from Pit 43?
A. Yes.
Q. From what portion of the pit and at which end was that taken?
A. From about elevation 249.6, from the southerly end.
Q. From the portion of the pit which you have marked on your cross-section, Plaintiff's Exhibit 52, "Loamy sand"?
A. Yes.
Q. Did you at my request hand each of those samples to Mr. Bratt for a chemical analysis?
A. I did.

Mr. Abbot: That is all.
Mr. Sutherland: No cross-examination.

[fol. 1103] Mr. Albert V. Bratt sworn.

Direct examination.

By Mr. Abbot:

Q. What is your full name?
A. Albert V. Bratt.
Q. What is your profession?
A. Chemist and testing engineer.
Q. From what institution were you graduated?
A. Tufts College.
Q. With what degree?
A. B. S. in Chemistry.
Q. In what year?
A. 1917.

Q. What has been your experience in chemical matters?

A. Since that time I have been five years with the New York, New Haven & Hartford Railroad, testing chemically and physically all materials pertaining to railroad use.

Q. What is your position now?

A. Chemist and testing engineer for the Department of Public Works, for the State of Massachusetts.

Q. In the course of your duties previous to your present position, and in your present position, have you had occasion to chemically analyze soil, from time to time?

A. I have not chemically.

Q. Have you had occasion to analyze it as an engineer, to determine the constituent parts of it?

A. As far as the determination of soils, I have had little. So far as the determination of materials pertaining to road construction, I have had a great deal.

Q. What do you mean by "materials pertaining to road construction"?

A. I refer to gravels, sands, cements, and subsoil which includes some clay, sandy clays, and so forth.

Q. Have you made many such examinations?

A. Not a great many.

Q. Did you receive from Mr. Ferguson, with the request that you [fol. 1104] test them, the samples to which he has referred?

Mr. Hoser: How does he know that he received the ones to which Mr. Ferguson referred?

Mr. Abbott: I asked him whether he [Ferguson] turned over these samples to Mr. Bratt. If there is any question I will ask that of Mr. Ferguson now.

Mr. Moser: You might ask him if he received samples turned over to him, from Mr. Ferguson.

Q. Did you receive samples turned over to you by Mr. Ferguson, for examination?

A. I did.

Q. Are those the samples that you received [indicating vials on the witness table, identified by Mr. Ferguson]?

Mr. Moser: There is no evidence that those are the samples that he took, so I don't think you can ask him that question.

Mr. Abbot: He can tell by examination.

Mr. Moser: There is no evidence that those are the ones that Ferguson took. The only evidence here is that he took some samples, and turned them over to Mr. Bratt.

Q. Are those the samples that you received from Mr. Ferguson?

Mr. Sutherland: I object to it on the ground that it is immaterial.

The Master: Overruled.

Mr. Sutherland: Exception.

A. Those are the samples submitted by Mr. Ferguson to me.

Mr. Abbot: Let me ask Mr. Ferguson one question.

[fol. 1105] Mr. JOHN N. FERGUSON recalled.

Further direct examination by Mr. Abbot:

Q. Mr. Ferguson, are these samples placed here on the table by you, the samples which you handed over to Mr. Bratt for examination?

A. Yes.

Mr. ALBERT V. BRATT resumed.

Direct examination.

By Mr. Abbot, continued:

Q. How did you proceed to test those samples turned over to you by Mr. Ferguson?

A. In testing these particular samples I merely went at them physically, in determining the amount of sand present in the samples as submitted, and in that determination I followed that method of the American Society of Testing Materials, serially designated as D-7421.

Q. Will you describe what is the nature of that method?

A. The nature of that method is taking an accurate sample of material submitted and dampening some, then putting it in the oven, drying it to the temperature of 100 to 110 degrees Centigrade; after which it is placed in a tar-ed beaker and covered with water, stirred vigorously for exactly 15 seconds. Then it is allowed to stand exactly 15 seconds, and immediately poured into another tar-ed container or beaker, being careful not to decant any of the sand retained in the original beaker No. 1, this process being continued until the washing water which has the fine minute material [fol. 1106] such as clay, is clear, after which this original beaker No. 1 is dried at the same temperature as the original material, 100 to 110 degrees Centigrade. The weight of the residue material is determined and figured in terms of percentage of the whole, which would give us the percentage of sand present in that material or vice versa, the percentage of clay and silt in the original sample as submitted.

Q. Whether or not the effect of this test is to cause any sand or heavier material to settle out, by gravity?

A. The idea of the whole thing comes down to the miner's method of separating the heavier gravity material from the lighter, the pan method.

Q. You analyzed the sample which purports to be taken from Pit No. 8, did you not?

A. I did.

Q. Whether or not you found any sand in that sample?

Mr. Moser: There is not any evidence in this record from which this witness can possibly tell where those samples were taken from.

I don't know that it makes any difference to you. This witness can not identify the pits they were taken from.

Mr. Abbot: Each bottle is marked, if you want to be precise.

[Further discussion off the record.]

Mr. Abbot: I should like to have it appear in the record that each of these bottles is marked with the number of the Pit from which it is taken, and that mark was made by Mr. Ferguson himself. Is that correct, Mr. Ferguson?

Mr. Ferguson: Yes. They are marked both on the side and on the top.

[fol. 1107] Q. Taking Pit No. 8; did you find any sand in that sample?

A. I did.

Q. What percentage of sand?

A. I found Pit No. 8 S1 16 per cent of sand.

Q. You tested each one of these samples in the way in which you have described, did you not?

A. These were tested in that particular way.

Q. Taking sample from Pit 29: Did you find any sand in that sample?

A. Are you referring to Pit 29, S1?

Q. Yes, 29 S1.

A. I did.

Mr. Moser: What do those marks "S1" and "S2" mean?

The Master: "S" stands for sample, doesn't it?

Mr. Abbot: Yes.

Mr. Moser: Some are marked "S1" and some "S2".

The Witness: Mr. Ferguson can clarify that.

Q. Did you say you found sand in the sample from Pit 29?

A. I did.

Q. What percentage?

A. In that particular pit I found 78 per cent.

Q. 78?

A. 78.

Q. Did you find any sand in the sample taken from Pit 28?

A. I did.

Q. What percentage of sand did you find there?

A. 17 per cent.

Q. Did you find any sand in the sample taken from Pit 32?

A. I did.

Q. What percentage?

A. 28 per cent.

[fol. 1108] Q. Did you find any sand in the sample taken from Pit 34?

A. I did.

Q. What percentage of sand?

A. 21 per cent.

Q. Did you find any sand in the sample taken from Pit 33?
A. I did.
Q. What percentage?
A. 23 per cent.
Q. Did you find any sand in the sample taken from Pit 43?
A. I did.
Q. What percentage of sand?
A. 14 per cent.
Q. Mr. Bratt, have you a test tube containing a sample from one of these pits in water, showing the way it settles out and so on?
A. I have.
Q. Will you produce it, please?
A. [Witness produces.]
Q. What does this test tube which you produce contain?
A. That contains a portion of the sample from the container submitted to me by Mr. Ferguson, marked No. 8, S1.
Q. What did you do with respect to that test tube?
A. The sample that I referred to was added to that particular test tube, and whirled with that amount of water as seen, with possibly slight variation, and then allowed to settle, showing first the settling out of the heavier materials, and then the lighter, and so on.
Q. Do you discern in that test tube two different layers of material?
A. If that could be seen in a magnifying way, it would be seen to be stratified.
Q. What is the material at the bottom?
A. We refer to it as a heavier gravity material known in this case as "sand".
Q. What is above it?
A. Above it is silt and clay.
[fol. 1109] Q. When you place that material in a test tube and agitate it, and then allow it to settle, the sand settles down at the bottom, and the clay settles out above. Is that correct?
A. Yes, sir.
Q. Now, we have here a flask. What is in that flask?
A. Exactly the same material as in the test tube.
Q. How long has that material been in the flask?
A. Since Saturday noon.
Q. As you look into that flask, do you discern any differentiation or stratification of material?
A. It can not be as readily seen in the flask as it can in the test tube, because of the large area. I brought the flask along so that it can be seen actually in whirling the flask, that the heavier material will settle out from the lighter.
Q. Will you agitate that flask?
A. I will [Demonstration by witness.] The light is poor here, but you can see now the sand precipitated from the lighter material above, according to the law of gravitation.
Q. Have you here a microscope with a slide prepared in it?
A. I have not a slide prepared, but I can do so in short order.
Q. Will you prepare a slide and show a sample of this material which you have described as sand?

A. I have not described it as sand, but containing sand.
Q. From what bottle are you taking this sample, Mr. Bratt?
A. Taking it from Bottle No. 8, S1.

[The witness is preparing a microscope slide.]

Q. Taking this slide which you have just prepared from material taken from Pit 8, do you discover by microscopic examina-
[fol. 1110] tion any sand in that sample?
A. I do.

Mr. Abbot: I would like to have the Master take a look at it through the microscope.

[Examination by the Master.]

The Witness: The large particles which have that quartzite effect are sand.
Mr. Abbot: I think that is all. You may cross-examine.

Cross-examination.

By Mr. Moser:

Q. What is sand?
A. Sand is decomposed rock, of silicious nature which consists mainly of silicon dioxide and additions or iron oxide and other materials added.
Q. What is clay? Isn't that decomposed rock?
A. Yes, decomposed, but in a finer divided state.
Q. Then the only difference, you think, between sand and clay, is that clay is more finely divided?
A. Exactly.
Q. Then, when you examined this material, the material which was deposited first you called sand?
A. Exactly.
Q And the material which was not deposited on the first test you called clay?
A. That was deposited later.
Q What was deposited later was called clay?
A. Clay and silt.
Q. In this Pit 8 you found 16 per cent sand and the rest clay?
A. Yes.
Q. And the only way that you distinguish clay from sand is that the clay was more finely divided than sand?
A. Yes.
Q. And therefore the less finely divided portions precipitated
[fol. 1111] earlier, and the more finely divided, precipitated later?
A. Yes.

Mr. Moser: That is all.

[Witness excused.]

Mr. JOHN H. EDMONDS sworn.

Direct Examination.

By Mr. Abbot:

Q. What is your full name?
A. John Henry Edmonds.
Q. What is your business?
A. Chief of the Archives Division in the office of the Secretary of the Commonwealth.
Q. How long have you held that position?
A. Since June 1, 1918.
Q. Is the Archives Division a portion of the office of the Secretary of State?
A. Yes, sir.
Q. And it is that portion where records, deposited in the Secretary of State's office, are kept?
A. All records pertaining to legislation and anything else that does not go any place else. It is everything pertaining to legislation, from the beginning.
Q. Is this the division in which the records pertaining to the Hartford Treaty have been kept?
A. Yes, the records pertaining to the Hartford Treaty and everything pertaining to it are kept there.
Q. Is the Hartford Treaty itself there?
A. Yes, sir.
Q. And the conveyance to Phelps & Gorham?
A. Certain conveyances. I believe that one conveyance we have not got, but most of the conveyances in connection with the case are there, and if we have not got the actual conveyance we have got a record of it.
Q. Was there at one time a request for the loan of certain of these records by the Secretary of State of New York?
[fol. 1112] A. Yes, there was, and as far as we know they were never returned.
Q. Is this the place where the records of action taken by the Governor and Council are kept?
A. The executive records of the Governor and Council from 1692 are there, and all the papers that go with it.

Mr Abbot: I should like to offer a resolve, Chapter 47 of the Resolves of 1828, the January Session. I will not read the whole of that resolve, but I simply call attention to the fact that that resolve, in addition to approving certain conveying of land conveyed to Massachusetts under the Hartford Treaty, provided at the end——

"That his Excellency, the Governor, by and with the consent and advice of the Council, be, and he hereby is authorized and empowered to confirm the aforesaid purchase of said petitioners, provided the same shall appear to His Excellency to have been made in conformity to the said articles of agreement; and also, to con-

firm in like manner, for, and in behalf of this Commonwealth, all other purchases, which have been made, or which may hereafter be made, in conformity to said articles of agreement, and to certify such confirmations, in such form and manner, under the seal of this Commonwealth, as His Excellency may think proper to carry the aforesaid articles of agreement into full effect."

[Resolved, January 26, 1828, authority for the Governor to confirm purchases, marked "Plaintiff's Exhibit 63."]

[fol. 1113] Q. Do you find there have been any subsequent confirmations under that resolve, Mr. Edmonds?

A. September 29, 1842, there was a confirmation by Massachusetts, and it is practically a proclamation of Governor John Davis, of the sale of land mentioned in the treaty of May 20, 1842. That has to do with the treaty between the Seneca Indians and Ogden & Fellows, relative to land granted by treaty, January 15, 1838.

Q. If you know, were the premises referred to here within the limits of the premises that were released and conveyed by the Hartford Treaty?

A. That I could not say at present.

Mr. Abbot: I think that is all.

Cross-examination.

By Mr. Sutherland:

Q. Do you remember, Mr. Edmonds, when I called upon you in reference to this matter?

A. I surely do.

Q. And you found, did you not, a letter from the then Governor John Davis——

A. Yes.

Q. —dated July 26, 1834, and addressed to the Secretary of State, and to the State Treasurer, with reference to those documents which were to be loaned for the purposes of the lawsuit?

A. Yes, sir.

Q. And did you make this photostat copy for me at that time?

A. Yes, sir.

Mr. Moser: When you say "lawsuit," do you mean for the present lawsuit?

Mr. Sutherland: When I asked the witness about a lawsuit I [fol. 1114] was not referring to the one now on trial, but to the one referred to in the Governor's communication which is dated 1834.

Q. That is a photostatic copy of the Governor's letter, is it not?

A. Yes.

Q. Which letter you found in the archives?

A. Yes.

Mr. Sutherland: I offer that in evidence to identify the documents which were sent out of the custody of the officer holding them

here to New York. This letter shows what they were and the purpose for which files, not records——

The Master: They were loaned to the State of New York?

The Witness: My record is they were borrowed by a man named Louber, to be used in the case in which the Holland Company was mixed up.

The Master: Did it have anything to do with this case?

The Witness: I don't know enough about it, and the New York titles, to tell you.

The Master: Do you know what was the purpose of the question about records or files being loaned to New York and not returned?

Mr. Abbot: What I meant was that they were portions of the files which related to matters arising under the Hartford Treaty, and the lands dealt with by that treaty. I understood the witness to say that they were.

Mr. Beach: But not relative to lands in controversy here?

The Master: I think all this should be stricken out of the record. [fol. 1115] Mr. Sutherland: I wish the witness would read over this letter and see if any other letters besides those referred to in the letter of Governor Davis, were contemplated in his reply to Mr. Abbot when he said they were transferred to New York.

Q. Won't you glance this over and tell us whether any other records were transferred to New York except those referred to in the letter of Governor Davis?

Mr. Beach: This all relates to land way to the west of land in controversy, and I think it clutters up the record in a bad way.

Mr. Sutherland: You ought to have the letter in.

The Master: Or else strike out all there is about it.

Mr. Beach: It would be better to have it all struck out, unless there is some advantage to the Commonwealth to have it appear that there were certain letters and papers which were transferred to New York and not returned. The testimony standing by itself is sinister.

Mr. Abbot: I have no objection to the letter.

Mr. Sutherland: I offer it.

[Letter, July 26, 1834, Governor Davis of Massachusetts to Secretary and Treasurer, for delivery of certain documents, marked "Defendants' Exhibit 19."]

Q. Do you know of the transmission of any other records, to New York, other than those mentioned in the letter of Governor Davis that has just been put in evidence?

A. I know that on July 28, 1834, they loaned four papers to John Louber as agent of the Holland Company.

[fol. 1116] Q. Who do you mean by "they"?

A. The Secretary.

Q. Are those the papers referred to by Governor Davis?

A. According to the office records they were—

An indenture between Gorham & Phelps and the Commonwealth, dated June 9, 1720, on parchment paper;

An agreement between the Commonwealth and Samuel Ogden, March 12, 1791, as to the sale of land.

An assignment of Samuel Ogden to Robert Morris, May 11, 1791;

And a copy of the deed to Robert Morris of about 800 acres, May 11, 1791.

Mr. Sutherland: Those are all in the record.

Mr. Beach: Now, will not Mr. Abbot state, to clarify the record, that those documents so loaned, referred to lands west of the Phelps & Gorham purchase?

Mr. Sutherland: Those documents are all in evidence.

The Master: I think they speak for themselves.

[Recess was taken at 1.05, until 2.15 p. m., this witness directed to return, but was not further interrogated, and was excused at the close of the day.]

[fol. 1117] FREDERIC N. WALES, Esq., sworn.

Direct examination.

By Mr. Abbot:

Q. What is your full name?

A. Frederic N. Wales.

Q. And your office?

A. Executive Secretary of the Department of Public Works.

Q. How long have you held that position?

A. Since the creation of the department of Public Works, in December, 1919.

Q. That department was created by the statute of 1919, Chapter 350, was it not?

A. Yes.

Q. Of what was the department composed prior to that time?

A. Do you want me to go back?

Q. Yes.

A. The Board of Harbor Commissioners was established by Chapter 149 of the Acts of 1866. In 1879 the Board of Ha-bor Commissioners and the Board of Land Commissioners were merged in one Board, namely, the Board of Harbor and Land Commissioners. In 1911, Chapter 748, a new board was established, the Directors of the Port of Boston, and to the Directors were transferred all the powers and duties formerly exercised by the Ha-bor and Land Commissioners, with respect to Boston Harbor.

In 1916 the Commission on Waterways and Public Lands was established, that Commission having all the powers and duties of the previous Board of Harbor and Land Commissioners, and the Di-[fol. 1118] rectors of the Port of Boston. In 1919 the Department of Public Works was made up of the Division of Highways, which

was established in 1917, and the Commission on Waterways and Public Lands, established in 1916.

Q. So that the Department of Public Works was made up of these Commissions that you have described, put together by the Statute of 1919, Chapter 350. Am I correct in that?

A. That is right.

Q. Prior to your becoming Secretary of the Department of Public Works, what position did you hold?

A. I was first in the Engineering Department of the Board of Ha-bor and Land Commissioners. Later on, I was clerk of that Board——

Q. How long have you held those positions?

A. Since 1882.

Q. Are you familiar with the records of the Department of Public Works?

A. Yes.

Q. Is there in that Department any general record or book describing the properties in charge of that Department?

A. There is not any such complete record—what you would call a complete record.

Q. Do Great Ponds come within the jurisdiction of that Department?

A. Yes.

Q. When were Great Ponds specifically committed to the Commission or Department to which they were committed?

A. By Chapter 318 of the Acts of 1888.

Q. And what Commission took jurisdiction of that, under that statute?

A. The Board of Harbor and Land Commissioners.

Q. Is there today, in the Department of Public Works, a complete enumeration of the so-called Great Ponds of the Commonwealth?

[fol. 1119] A. That is an approximately complete list—approximate only.

Q. When was that made up?

A. The latest list was made up about 1918, but it is being constantly changed by reason of the fact that the Division of Waterways and Public Lands have recently been authorized by the Legislature to make surveys of Great Ponds.

Mr. Abbot: I want to offer the so-called Ordinance of 1641-47, which is found in the Ancient Charters, Chapter 43—Ancient Charters being published under the authority of the Commonwealth. This provides that

"Every inhabitant who is an householder shall have free fishing and fowling in any Great Ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the General Court have otherwise appropriated them:

"Provided, that no town shall appropriate to any particular person or persons, any Great Pond, containing more than 10 acres of land,

and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed."

I also call attention to Setion 4 of that Ordinance:

"And for Great Ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow."

[fol. 1120] Mr. Beach: It declares that ponds over 10 acres are within this description?

Q. What you have referred to as Great Ponds are those referred to in the Statute of 1641-47?
A. Yes.

Mr. Abbot: I will offer that in evidence.

[Act, 1641, respecting Great Ponds, Chapter 63, Ancient Charters marked "Plaintiff's Exhibit 64".]

Q. I understand, Mr. Wales, that even with respect to Great Ponds there is no complete records today of the Great Ponds of the Commonwealth, is there?
A. That is substantially correct; yes, sir.

Mr. Abbot: That is all I wanted to ask.

Cross-examination.

By Mr. Sutherland:

Q. Mr. Wales, a question or two. Are you able to state when the office of Land Agent was abolished?
A. About 1861.
Q. Was the duty of the Land Agent transferred, then, to some other officer, with respect to public lands?
A. The jurisdiction of the Land Agent was transferred to the Commissioners on Public Lands.
Q. Commissioners on Puble Lands?
A. Yes.
Q. By some act passed in 1861?
A. Yes, I think so.
Q. I was looking for that, but I could not locate the act by which his duties were transferred to some other. A little later those duties vested by statute in the Board of Harbor and Land Commissioners.
A. First, the Harbor Commissioners, in 1866.
[fol. 1121] Q. Is that when the Land Agent ceased?
A. Five years previous to that, 1861.
Q. To what office were his duties transferred?
A. To the Commissioners on Public Lands.
Q. By statute passed in 1861?
A. Yes, sir.

Q. And then, in 1866, there was a merger of the Harbor and Land Commissioners, was there?

A. No. There was a merger of the Harbor Commissioners and of the Land Commissioners in 1879.

Q. When did the authority of the Land Commissioners over public lands cease?

A. On the passage of Chapters 149 of the Acts of 1866, establishing the Board of Harbor Commissioners.

Q. But the Land Commissioners still existed after that, did they?

A. I think not.

Q. You said that in your direct examination, in 1879 the Harbor Commissioners and the Land Commissioners were merged?

A. Yes, and the Harbor Commissioners and the Land Commissioners before the merger were vested with all the powers and duties of the Commissioners on Public Lands.

Q. And those had existed from 1861 to 1866?

A. Yes.

Q. You have not the particular chapter in 1861, which ended the jurisdiction of the Land Agent over the public lands of Massachusetts, have you?

A. The powers and duties of the Land Agent were transferred to the Commissioners on Public Lands by Chapter 85 of the Acts of 1861.

Q. Have you examined the reports or records of the Land Agent [fol. 1122] from 1859 down to and including 1861 to see whether in those reports and records there is any reference whatever to any interest or right of the State of Massachusetts in any lands on the shore of the Lake Ontario?

A. I have not examined those very closely. I have read them over from time to time, but I have not made what you would call a full and complete examination.

Q. I am very anxious that that should be done, because the statute imposed an affirmative duty upon the Land Agent to report to the Legislature whether there was any encroachments or trespassers upon any of the lands belonging to the Commonwealth of Massachusetts. I would like to know whether or not in any report of the Land Agent——

Mr. Abbot: What statute is it which imposes such a duty?

Mr. Sutherland: Chapter 103 of the Resolves of 1859. He was required to report whether there was any encroachments or trespassers upon any lands belonging to the Commonwealth, and I want to know whether he did report any encroachments or trespassers. Likewise, whether his successors, reported any encroachments or trespassers. The same duty is placed upon the Harbor and Land Commissioners with reference to encroachments and trespassers. Now, I must look at the statute of 1861, which the witness has referred to, to see if that duty devolved upon the intermediary officer who held the jurisdiction from 1861 to 1866, or whenever the Harbor and Land Commissioners took it over. There was an affirmative duty upon the officers to make a record of all the lands belonging to the Commonwealth, and a report upon any encroachments or trespassers.

[fol. 1123] Mr. Abbot: Didn't that refer to Maine?

Mr. Sutherland: It referred to all the land. In 1816 it referred to Maine, but in 1859 it was broadened to include any land anywhere, and if there is anything we want to have it shown.

The Master: Are you asking a question.

Q. [resumed]. Can you make that examination for us, Mr. Wales?

A. Yes, I can.

Q. How long would it take, sir?

A. I should say not very long.

Q. I don't want to keep the Court here for that purpose.

Mr. Sutherland: Can we make this stipulation: That anything in any report of the Land Agent beginning with 1859, or his successor in office or in function, these various Commissions that have been named, may be regarded as in evidence or put in evidence by correspondence rather than having another hearing? We want everything that there is in any record of Massachusetts, your Honor, respecting any claim or any consciousness of possession, or any attempt to exercise jurisdiction over these lands during this period, and we say there is not any. If there is, let them produce it, and we will have it in evidence, and if they don't produce it, we want it considered that there is no such evidence.

The Master: It is agreeable to you to stipulate that the results of this search which Mr. Wales is asked to make, or any search made by counsel for either party, may be communicated to the Special Master, and after it has been submitted to opposing counsel may be incorporated in the record? I have no objection.

Mr. Abbot: I have no objection to any search by Mr. Wales, but [fol. 1124] I don't want to take anything that counsel——

The Master: No, leave it this way: If you find anything you submit it to counsel on the other side, and anything they find they will submit to you, and if you can not agree about it being properly in the record, we will have another hearing.

Mr. Abbot: That might be done.

Mr. Sutherland: Yes, that is satisfactory.

Mr. Moser: With the further stipulation that if nothing is produced, then let it be conceded that there is none.

Mr. Abbot: That none has been found.

The Master: That is a matter of argument. We will regard it settled in that way.

Redirect examination.

By Mr. Abbot:

Q. Have you ever had occasion to investigate with respect to the Land Agent to whom Judge Sutherland has referred?

A. Every now and then there comes a question where there was a license granted many years ago, whether during the time when there was a Land Agent, handling those things, he did anything, and we

have occasion to go back and look for that particular thing in the records of the doings of the Land Agent. It is not often that we have any occasion to examine into them.

Q. Has your examination led you to ascertain what properties were in charge of the Land Agent?

Mr. Sutherland: That is defined by statute, your Honor. I object to this witness stating now what the statute says to be the duties of the Land Agent. The duty is very clear on the subject and I have called attention to the act.

[fol. 1125] Mr. Abbot: You are relying simply on the Acts of 1859?

Mr. Sutherland: And its successor Act which says that its successor agent shall discharge the duties pertaining to the Land Agent constituted by Chapter 153 of the Resolves of 1859. It is continued right along for a long time. Further, your Honor, the specific duty is laid upon that Officer to report to the Legislature any trespassers or encroachers, and the duty is put upon State officers to prosecute for such encroachments. It is all there.

The Master: Does the statute set out what lands?

Mr. Sutherland: I certainly object to his saying what was subject to his jurisdiction, because the statute says that all the lands of the Commonwealth are subject to his jurisdiction. How can he narrow the jurisdiction?

The Master: He would not narrow it but would define it.

Mr. Sutherland: I shall not quarrel with the Court at all. If you want him to testify, go ahead.

The Master: I think we will hear that.

Mr. Sutherland: I take an exception to the ruling.

[The question is read: "Has your examination led you to ascertain what properties were in charge of the Land Agent"?]

Mr. Sutherland: I object to that because it calls for the interpretation of the statute—not the practice of the department, but the interpretation of the statute.

The Master: It ought to be put—of what lands the Land Agent actually took charge.

[fol. 1126] Q. Of what land did the Land Agent actually take charge?

A. I don't quite get that.

[The question is read, as revised.]

A. To a certain extent.

Q. What were those lands,—in general, I mean.

A. Especially lands bounding on tidewaters around Boston.

Q. Those lands bounding on the sea?

A. Yes. As I said before, my examination has been more frequently as to the question of licenses, whether any authority was originally given to a certain party to do something in the nature of building a wharf.

The Master: In other words, the lands which you were familiar with as coming within the charge of the Land Agent and his successor in office, were the lands lying upon tidewaters?

The Witness: Substantially.

The Master: But you don't know whether there were other lands that were within his jurisdiction or not, or what they were?

The Witness: If I was making an examination I should base it on what the Land Agent's duties and powers were under that Chapter 103 of the Resolves of 1859.

Q. And if that statute provided that he should have charge of all the lands belonging to the Commonwealth of Massachusetts, there is nothing that you know of in the practice of the Department that is inconsistent with the strict obedience of that statute, is there?

A. No.

Mr. Abbot: I think that is all.

[Witness excused.]

[fol. 1127] Mr. Abbot: I offered earlier this morning the Act of 1786, Chapter 18, of the May Session. That has already been marked Exhibit 58.

I now offer a report of a legislative committee, which appears in the Acts of 1786, January Session, at page 459, being the report of the legislative committee approving the action of the Commissioners in entering into the Hartford Treaty, and the Hartford Treaty is printed immediately succeeding thereto. That was the 1786 Legislature holding over into January, 1787.

[Acts 1786, January Session, relative to settlement of controversy, marked "Plaintiff's Exhibit 65."]

Mr. Abbot: Resolves of 1790, Chapter 44, which is a resolve appointing a committee to make a final and absolute settlement with Gorham & Phelps.

[Resolve, February 16, 1791, Chapter 44 of the Resolves of 1790, appointing a committee, marked "Plaintiff's Exhibit 66."]

Mr. Abbot: Resolves of 1790, January Session, Chapter 156, which continues that same committee. It is a resolve passed March 11, 1791. The other one was February 16, 1791.

[Resolve, March 11, 1791, Chapter 156 of the Resolves of 1790, continuing committee to settle, marked "Plaintiff's Exhibit 67."]

Mr. Abbot: Resolves of 1805, May Session, Chapter 47, being a resolve passed June 15, 1805, which provides for depositing certain papers in connection with this matter, in the office of the Secretary of State.

[fol. 1128] [Resolve, June 15, 1805, Chapter 47, marked Plaintiff's Exhibit 68."]

Mr. Abbot: Then, statute, 1859, Chapter 223, approved April 6, 1859, which provides in substance that conveyances of Commonwealth lands and flats must be approved by the Governor and Council.

[Act April 6, 1859, Chapter 223, relative to conveyances of lands or flats, marked "Plaintiff's Exhibit 69."]

Mr. Abbot: I now want to offer a certified copy of the recording entries which appear on the back of the Hartford Treaty as filed in the office of the Secretary of State, in New York.

[Certified copy of recording entries, in office of Secretary of State, New York, marked "Plaintiff's Exhibit 70."]

Mr. Abbot: I now offer a certified copy of Volume 1, page- 117-118, of treaties and contracts, in the office of the Secretary of the Commonwealth of Massachusetts, which is the assignment by Ogden to Morris.

[Assignment, May 11, 1791, Samuel Ogden to Commonwealth of Massachusetts, copy, marked "Plaintiff's Exhibit 71."]

Mr. Abbot: I now offer a certified copy of Volume 1, pages 111-116, treaties and contracts, in the office of the Secretary of State of the Commonwealth, being a certified copy of the agreement March 12, 1791, between the legislative committee and Robert Morris.

[Agreement, March 12, 1791, Commonwealth of Massachusetts and Samuel Ogden, marked "Plaintiff's Exhibit 72."]

Mr. Sutherland: That is a part of Defendant's Exhibit 4.
[fol. 1129] Mr. Abbot: We will agree that if it is in, all right, and if it is not in it shall now be deemed in.
I also offer a certified copy of an agreement on file in the office of the Secretary of State of Massachusetts, executed March 10, 1791, between the Commonwealth of Massachusetts and Phelps & Gorham, which constitutes the final settlement with them on the first of their 100,000 pounds.

[Agreement, March 10, 1791, Commonwealth of Massachusetts and Phelps & Gorham, copy, marked "Plaintiff's Exhibit 73."]

Mr. Abbot. That is everything I have to offer, your Honor.
The Master: Have you anything further, Judge Sutherland?
Mr. Sutherland: I don't think so.
The Master: Then both sides rest?
Mr. Abbot: Yes.
Mr. Sutherland: Yes, with the exception of the report to be made by Mr. Wales to us. We would like to see the brief of counsel for the Commonwealth of Massachusetts before we finish our brief, and before the argument.

[After discussion, it was directed that the plaintiff's brief be filed not later than May 10, the defendants' brief not later than June 1, and the plaintiff's reply brief June 10, the case to be argued about

the middle of June. Thereupon, at 3.45, the hearing was adjourned to such further time as may be assigned.]

[fol. 1130] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF SPECIAL MASTER

I hereby certify that the foregoing is an accurate and complete transcript of the proceedings in the above entitled cause and contains, together with the exhibits attached thereto, all the proofs, evidence, and testimony presented, offered or adduced, both on the part of the plaintiff and the defendants.

Wade H. Ellis, Special Master.

[fol. 1131] PLAINTIFF'S EXHIBIT 1.

Treaty of Hartford, omitted in printing. This exhibit printed as a foot note to the report of Special Master, pages 11 to 16, incl.

[fol. 1132] PLAINTIFF'S EXHIBIT 2

Letter Head of the Commonwealth of Massachusetts

Office of the Secretary, Archives Division, Boston, 9

May 10, 1923.

I hereby certify the following to be a true photostatic copy of pages 107, 108, 109 and a portion of 110 of Vol. 1, "Treaties, Contracts, etc.," deposited in the Archives Division of this office.

Witness the Great Seal of The Commonwealth.

(Signed) F. W. Cook, Secretary of the Commonwealth.

[fol. 1133] To all people to whom these presents shall come, Greeting:

Know ye that we the Sachems, Chiefs & Warriors of the five Nations of Indians for and in consideration of the sum of two thousand one hundred pounds lawful/ money of the State of New York paid and received by us, to our full satisfaction, of Oliver Phelps of Granville in the County of Hempshire and Commonwealth of Massachusetts Esquire, and Nathaniel Gorham of Charlestown in the County of Middlesex in the Commonwealth aforesaid and of which we do hereby release and discharge them the said Oliver and Nathaniel & particularly in consideration of the Covenant and engagement made and executed by the said Oliver Phelps in behalf of the said Nathaniel & himself by Deed of even date with these presents have given, granted, ceded, bargained, sold, aliened conveyed and

confirmed, and by these presents do hereby give, grant, cede, bargain, sell alien convey and confirm unto them the said Oliver Phelps and Nathaniel Gorham and to their heirs and assigns forever all that territory or Country of land lying within the State of New York contained within & being parcel of the lands and territory, the right of pre-emption of the soil whereof from the native Indians was ceded by the State of New York aforesaid to the Commonwealth aforesaid by Deed of Cession executed at Hartford by Commissioners for that purpose on the sixteenth day of September in the year of our Lord One thousand seven hundred and eighty six within the following limits and bounds; that is to say: Beginning in the north boundary line of the State of Pennsylvania in the parallel of forty two degrees north latitude at a point distant eighty two miles west from the north east corner of Pennsylvania on Delaware river as the said boundary line hath been run and marked by the Commissioners, appointed by the States of New York & Pennsylvania respectively, and from said point or place of beginning, running west upon said line to a meridian which will pass through that corner or point of land made [fol. 1134] by the confluence of the Thanahasgwaikon Creek *Creek* so called with the waters of the Genesee river thence running north along the said meridian to the corner or point last mentioned thence northwardly along the waters of the said Genesee river, to a point two miles north of Thanawageras village, so called, thence running in a direction due west twelve miles, thence running in a direction northwardly, so as to be twelve miles distance from the most westward bends* of said Genesee river to the shore of the Ontario Lake thence eastwardly along the shores of said Lake to a meridian which will pass through the first point or place of beginning above mentioned, thence south, along said meridian to the first point or place of beginning aforesaid, together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory, to have and to hold, the above granted and bargained premises, together with all the appurtenances and privileges thereunto belonging or in any wise appertaining, to them the said Oliver Phelps and Nathaniel Gorham and to their heirs and assigns forever: An- we the underwritten Sachems, Chiefs, and Warriors do hereby covenant and engage to and with the said Oliver Phelps, Nathaniel Gorham and their heirs, executors and administrators, that we will Warrant and defend the above granted and bargained premises to them the said Oliver, Nathaniel and their heirs & assigns against all claims whatsoever.

In witness whereof we have hereunto set our hands and seals this eighth day of July in the year of our Lord one thousand seven hundred and eighty eight.

Mohawks	Name: —— ——.	[L. S.]
	Name: —— ——.	[L. S.]
	Name: —— ——.	[L. S.]
Oneidas	Name: —— ——.	[L. S.]
	Name: —— ——.	[L. S.]
	Name: —— ——.	[L. S.]

*See photostat.

Onnodagoes.....
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]

[fol. 1135]

Onondagoes.....
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]

Cayogos .....
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]
Name: —— ——. [L. S.]

Senekas.....	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]
	Name: —— ——,	[L. S.]

Signed, sealed & delivered in presence of John Butler, Dept. Agt., Sam'l Kirkland, Superintendant, in behalf of Massachusetts. James Dean, Interpreter. Elisha Lee, for Brant, Ben Barton, David Smith, Ezt Scott.

Pursuant to a Resolution of the Legislature of the Commonwealth of Massachusetts passed March 30th, 1788, I have attended a full and general treaty of the five nations of Indians at the chief Village in their territory on Buffalo Creek, alias Teyoheghalotea, when the foregoing instrument, or deed of conveyance made to the honorable Nathaniel Gorham & Oliver Phelps Esqrs. of a certain part of the lands belonging to the said five nations the discription and boundaries thereof being particularly specified in the same, was duly executed, signed, sealed, and delivered in my presence by the Sachems Chiefs and warriors of the above mentioned five *five* nations, being [fol. 1136] fairly and properly understood & transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction and content: And I do therefore hereby certify and approve of the same.

Samuel Kirkland, Missionary, Superintendant, in behalf of the Commonwealth of Massachusetts.

A true copy.
Attest:

John Avery, Jun., Secretary.

[fol. 1137] PLAINTIFF'S EXHIBIT 3

Commonwealth of Massachusetts

In the House of Representatives, March 31st, 1788

On the proposal made to the General Court by the honorable Nathaniel Gorham and Oliver Phelps, esquires, to purchase for the consideration of three hundred thousand pounds in consolidated securities of this Commonwealth, or two thousand pounds specie together with two hundred and ninety thousand pounds in like securities, the right of pre-emption which this Commonwealth has in and to the Western Territory, so called, lately ceded by the State of New York to this Commonwealth as appears by deed executed by their

respective Commissioners at Hartford the 16th day of December, A. D. 1786.

Resolved, that the said proposal for purchasing the Land aforesaid for the consideration of three hundred Thousand pounds in consolidated securities of this Commonwealth be and hereby is accepted.

And this Commonwealth doth hereby agree to grant, sell and convey to the said Nathaniel Gorham and Oliver Phelps Esquires all the Right Title and demand which the said Commonwealth has in and to the said Western Territory by the Deed of Cession aforesaid. To have and to hold the same to the said Nathaniel Gorham & Oliver Phelps Esquires their heirs and assigns forever upon the Conditions hereafter expressed; and the said Nathaniel Gorham and Oliver Phelps are hereby authorized to extinguish by purchase the Claims of the Native Indians holding the fee or right of Soil in the Territory aforesaid. And it is hereby

Resolved that the Reverend Mr. Samuel Kirkland be and hereby is appointed to superintend and approve at the Exepnce of the said Grantees the purchase which the said Nathaniel Gorham and Oliver Phelps Esquires shall make of the Claims of such Native Indians. And it is hereby further

Resolved that all such purchases as the said Nathaniel Gorham and Oliver Phelps shall make of the Claims of the said Indians in presence of the said Superintendant shall be confirmed by this Commonwealth, provided the said Gorham and Phelps shall give security to the Satisfaction of the Supreme Executive of this Commonwealth [fol. 1138] seperate obligations to pay the aforesaid consideration monies to the Treasurer of this Commonwealth or his successor in Office for the use of this Commonwealth, one third thereof in one year, one other third thereof in two years and one other third thereof in three years from the date of this Resolve with interest in like consolidated securities to commence from the date of this Resolve until paid.

Sent up for concurrence. James Warren Speaker.

In Senate, April 1st, 1788. Read and concurred. Samuel Adams, Presidt.

Approved. John Hancock.

Trust Copy. Attest:

John Avery, Junr., Secretary.

Commonwealth of Massachusetts, in the Year of Our Lord One Thousand Seven Hundred and eighty-eight

An Act For Confirming to Nathaniel Gorham & Oliver Phelps, Esquires, a Certain Tract of Land Pursuant to a Contract Made with them for That Purpose.

Whereas the Legislature of this Commonwealth by their resolve of the first of April last, did agree to grant, sell and convey to the

said Nathaniel Gorham and Oliver Phelps all the Right, Title and demand which the said Commonwealth has in and unto the said Lands ceded by the State of New York, to the said Commonwealth by Deed executed by their respective Commissioners at Hartford the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty-six, upon the Conditions in the said Resolve expressed.

And whereas the said Nathaniel Gorham & Oliver Phelps have on their part performed the said Agreement & complied with the Conditions of the said Resolve,

And whereas, the said Nathaniel Gorham & Oliver Phelps by virtue of authority derived from the aforesaid Resolve, have by deed, from the Sachems Chiefs and Warriors of the five Nations of Indians bearing date the eighth day of July last, purchased the claims of the Native Indians to the Fee or Right of Soil in part only of the said Lands as contained within the descriptions of the said Deed hereafter inserted which purchase appears to have been made under [fol. 1139] the Superintendence prescribed and in the manner intended by the aforesaid Resolve.

Be it therefore enacted by the Senate & House of Representatives in General Court Assembled & by the authority of the same, that there be and hereby is granted & confirmed unto Nathaniel Gorham of Charles Town in the County of Middlesex Esquire and Oliver Phelps of Granville in the County of Hampshire Esquire their heirs and Assigns, All the Right title Claim and demand which this Commonwealth has in and to the following Tract of Land to wit: Beginning on the North Boundary Line of the State of Pen-sylvania in the parrallel of forty two degrees north latitude at a point distant eighty two miles west from the north east corner of Pen-sylvania on Delaware River as the said Boundary Line has been run and marked by the Commissioners of the States of New York and Pen-sylvania respectively and from the said point or place of Beginning running west upon the said Line to a meridian which will pass through that corner or point of Land made by the confluence of Thanahasgwaicon creek with the waters of the Genisee River, thence north along the said meridian to the Corner or point Last mentioned, thence *m*orthwardly along the Waters of the said Genisee River to a point two miles north of Tnanawageras Village so called; thence running in a direction due west twelve miles; thence running in a direction northwardly so as to be twelve miles distant from the most westward Bounds of the said Genisee River to the Shore of the Ontario Lake; thence eastwardly along the Shores of the said Lake to a meridian which will pass through the first point or place of beginning aforementioned; thence south along the said Meridian to the first point or place of beginning aforesaid, being such part of the whole Tract purchased by the Grantees as aforesaid as they have obtained a Release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging. To have and to hold the same to them the said Nathaniel Gorham & Oliver Phelps, their heirs & Assigns forever, as Tenants in common & not as Joint Tenants.

[fol. 1140] In the House of Representatives November 21st, 1788. This Bill having had three several readings passed to be enacted. Theodore Sedgwick, Speaker.

In Senate November 21st, 1788. This Bill having had two several Readings, passed to be Enacted. Samuel Phillips, junr., President.

By the Governor: Approved. John Hancock.

True Copy. Attest: John Avery, Junr., Secretary Commonwealth of Massachusetts.

By His Excellency John Hancock, Esqr., Governor of the Commonwealth of Massachusetts. (L. S.) John Hancock.

The Secretary signed his Excellency's name by his order, he being unable to put his signature by reason of the Gout in his right hand.

I do hereby certify that John Avery junior Esqr., Secretary of the Commonwealth of Massachusetts duly constituted and sworn. And that to his acts and attestations as on the annexed Papers full of faith and credit is & ought to be given both in and without.

In Testimony Whereof, I have caused the public Seal of the said Commonwealth to be hereunto affixed this twenty-fourth day of January Anno Domini 1789 and in the Thirteenth year of the Independence of the United States of America.

The aforegoing instrument under the public Seal of the Commonwealth of Massachusetts was recorded at the request of Nathaniel Gorham therein named and is a true copy. Word other interlined between the 2d and 3d lines of the preceeding page, and words (have on their part performed the said agreement & complied with) 19th & 20th lines, and word therefore 27th all in preceeding page written on erazures. Examined this 6th of Feby. 1789 by me.

Lewis A. Scott, Secretary.

State of New York,
Office of the Secretary of State, ss:

I have compared the preceding copy of Deed with the record thereof in this office in Book Number 22 of Deeds at page 229 and I do hereby certify the same to be a correct transcript therefrom, and of the whole thereof.

[fol. 1141] Witness my hand and the Seal of office of the Secretary of State, at the City of Albany, the seventh day of June one thousand nine hundred and —.

Horace G. Tennant, Second Deputy Secretary of State.
(Seal.)

A true copy of the original. Recorded 29 October 1909 at 2-05 p. m. and examined.

STATE OF NEW YORK,
County of Ontario, ss:

I, Howard D. Aldrich, Clerk of the County of Ontario, and also Clerk of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared the annexed copy of Deed with the original recorded in this office in Liber 272, Page 392, and that the same is a correct transcript therefrom, and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County and Courts at Canandaigua, N. Y., the 17 day of May, 1920.

Howard D. Aldrich, Clerk. [Seal Ontario County.]

[fol. 1141a] [Endorsed:] Certified copy. State of Massachusetts to Nathaniel Gorham and Oliver Phelps. Ex. 4. June 22/20. W. R. L. Emma N. Pollard Greer, Fred Holden Greer.

[fol. 1142] Benton, June 28th

PLAINTIFF'S EXHIBIT 57. H. A. Edgecomb, Court Reporter

41213

Jun. 28, rec. June 28, ans. Received Jun. 29, 1920, Secretary's office.

City of Rochester, N. Y., Department of Law

(Seal of the City of Rochester.)

Charles L. Pierce, Corporation Counsel. Albert L. Shepard, Deputy Corporation Counsel

Assistants: Arthur G. Dutcher, Clarence M. Platt, Israel Schoenberg, Charles B. Forsyth, Charles F. Lauer

Attorney General of the State of Massachusetts, Boston, Massachusetts.

DEAR SIR: I am sending you under separate cover a map of lands at the mouth of the Genesee River. These lands are now within the boundaries of the City of Rochester, New York, and the City of Rochester is seeking to acquire the same by condemnation proceedings, and the lands are to be used by it for municipal purposes.

The reason why I am bringing the matter to your attention is that I would like you to determine from the map and the facts which I will now relate, whether you believe that the State of Massachusetts has any title or interest to the lands in question. If you will look at the map you will see a yellow line drawn across it.

This line represents correctly the location of the shore line of Lake Ontario in 1811. The red line encloses the lands in question which the City of Rochester seeks to acquire. The land in question comprises about eighteen acres and the persons and corporations owning the land are asking four hundred thousand dollars for it. This is, of course, an outrageous price. The map also discloses the present shore line of Lake Ontario and on the right side of the map the location of the Genesee River is given. The United States Government has built a concrete pier which appears [fol. 1143] on the map and which extends out into Lake Ontario about three thousand feet.

You are doubtless aware that the territory comprising western New York was claimed by both Massachusetts and New York. By Massachusetts by virtue of a grant of King James I to Plymouth Colony, and by New York by virtue of a grant from King Charles II to James Duke of York, made in 1664. New York and Massachusetts composed their differences by the Treaty of Hartford signed in 1786, by virtue of which Massachusetts surrendered her claim to sovereignty and New York granted to Massachusetts in return the title to most of the land in western New York.

I offered in evidence a certified copy of the treaty in the proceedings which the City has taken in this matter, and the territory described in the treaty and about which the controversy arose was described in the treaty as being bounded on the north by the boundary between United States Government and the Dominion of Canada, which is the center of Lake Ontario. In March 1788 Massachusetts conveyed to Nathaniel Gorham and Oliver Phelps half of the land covered by the Hartford Treaty, and the northern boundary of the grant from Massachusetts to Phelps and Gorham was described as the shore line of Lake Ontario. The land required as plotted on the map is within the territory mentioned in the Hart- [fol. 1144] ford Treaty and is north of the land granted by Massachusetts to Phelps and Gorham. You will, therefore, see that the land in question now was under the water of Lake Ontario at the time of the Phelps and Gorham purchase because it was north of the shore of Lake Ontario. There is no record that Massachusetts has ever disposed of the land mentioned in the Hartford Treaty lying north of the shore of Lake Ontario as it existed one hundred and twenty years ago.

Massachusett's title to the land under water of Lake Ontario seems to be the same as the title to the land under the waters of Oyster Bay, New York, which land under Oyster Bay was in dispute and the title thereof was settled in the action of Tiffany vs. Oyster Bay, decided by the Court of Appeals of the State of New York, and reported in Vol. 209 N. Y. at page 1, and in favor of Oyster Bay as against a grant thereof by the State of New York to Tiffany. You doubtless have access to the New York Court of Appeals report and I need not state further the purport of the decision of Tiffany vs. Oyster Bay.

Tiffany after the Court of Appeals decision sought to restore the land to its former condition by removing the fill and Oyster Bay

by injunction prevented him from doing it. We are making the claim that the land in question did not come as a result of accretion [fols. 1145–1148] and that there would be no land there now had the United States Government not built the concrete pier.

The second clause of the Hartford Treaty provided as follows: "Secondly the State of New York doth hereby cede, grant, release and confirm to the said Commonwealth of Massachusetts and to the use of the Commonwealth their grantees and the heirs and assigns of such grantees forever the right of preemption of the soil from the native Indians."

The matter is adjourned until Tuesday the 29th of June, and if you think that Massachusetts has any interest in this, or if you desire further information, I shall be glad to hear from you. Of course, if it shall be determined that Massachusetts has a claim to the land in question we would very much like to negotiate with the State for the purchase of it.

Hoping that I have made myself clear, I remain,

Yours very truly, Albert L. Shepard, Deputy Corporation Counsel.

[fol. 1149] PLAINTIFF'S EXHIBIT 58. H. A. Edgecomb, Court Reporter

Page 53

Acts 1786.—Chapter 18

(May Session, ch. 18)

An act empowering the agents appointed by this Government to defend the territory on the west side of Hudson's River against the claims of the State of New York, to settle the controversy relative thereto, otherwise than by a Fœderal court, if they shall judge expedient.

Whereas it appears that the Legislat*ive* of New York, have by their Act empowered the Commissioners by them appointed for vindicating the right and jurisdiction of the State of New York, against the claim of this Commonwealth, to settle the controversy, otherwise than by a fœderal Court:

Be it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same, That the Agents or Commissioners appointed by this Government to defend the territory of this Commonwealth on the west side of Hudson's river against the claim of the State of New York, or the major part of the said Agents or Commissioners, be, and they are hereby fully authorized and *i*mpowered to agree with the Agents or Commissioners of the State of New York, and settle the controversy respecting the territory aforesaid, by a Fœderal Court, as appointed by virtue

of the Confederation, or otherwise, in such way and manner as they shall judge will comport with justice, and the interest of this Commonwealth.

July 5, 1786.

[fol. 1150] PLAINTIFF'S EXHIBIT 59. H. A. Edgecomb, Court Reporter

Department of Public Works, Rochester, N. Y.

(Seal of the City of Rochester)

Herbert W. Pierce, Commissioner

February 16, 1921.

To the Commonwealth of Massachusetts; to the General Court of Massachusetts; to His Excellency Channing H. Cox, Governor of Massachusetts; to the Honorable J. Weston Allen, Attorney General of Massachusetts.

GENTLEMEN: The City of Rochester, New York, has determined to purchase, for park purposes, certain real estate situate on the shore of Lake Ontario, lying immediately west of the mouth of the Genesee River. This property consists of about twenty-five (25) acres of land and lies within the territorial limits of the City of Rochester.

The Corporation Counsel of the City of Rochester is of the opinion that the title to the property in question is in the Commonwealth of Massachusetts. Accordingly, the undersigned, the Commissioner of Public Works of the City of Rochester, whose duty it is, under the Charter of said City, to purchase all properties which the City requiries for its purposes, respectfully requests that the Commonwealth of Massachusetts sell, grant and convey to the City of Rochester the property in question, which is particularly described in the ordinances [fol. 1151] of the City, duly adopted by the Common Council thereof, authorizing the said purchase at a price to be agreed upon between the Commonwealth of Massachusetts and the undersigned Commissioner of Public Works, and to be approved by the Board of Estimate and Apportionment of said City. The price to be agreed upon would, of course, include any expense incurred by the Commonwealth in prosecuting any judicial proceeding which may be necessary to quiet the title and establish, beyond present or future question, the right of the Commonwealth to convey a good and indefeasible title to the land which the City seeks to purchase.

Accurate descriptions and maps of the property in question and the duly certified copies of the ordinances above referred to have been furnished the Honorable J. Weston Allen, Attorney General of the Commonwealth, and the property has been personally inspected by the Honorable Jay R. Benton, Deputy Attorney General.

The City of Rochester is now in possession of the property in

question and is anxious to make compensation to the lawful owner thereof without further delay.

This formal communication will be supplemented by a request in person, which the undersigned will make on Friday, February 18th, 1921.

All of which is respectfully submitted,

Herbert W. Pierce, Commissioner of Public Works of the City of Rochester, New York.

V.

[fol. 1152] PLAINTIFF'S EXHIBIT 60. H. A. Edgecomb, Court Reporter

The Commonwealth of Massachusetts, Executive Department

Boston, February 23, 1921.

Hon. J. Weston Allen, Attorney General, State House, Boston.

DEAR SIR: I have received from Mr. Herbert W. Pierce, Commissioner of Public Works of the City of Rochester, New York, a letter, under date of February 16, 1921, in which he informs me that the City of Rochester desires to purchase from the Commonwealth, for park purposes, some twenty-five acres of land situated on the shore of Lake Ontario immediately west of the mouth of the Genesee River and within the territorial limits of the City of Rochester.

The Corporation Counsel of the City of Rochester is of the opinion that the title to the property in question is in the Commonwealth of Massachusetts.

I am informed taht the claim of the Commonwealth to this land rests upon royal grants which were confirmed by a treaty concluded between the Commonwealth and the State of New York at Hartford, Connecticut, in 1786, which treaty has been approved subsequently by the Congress of the United States.

In accordance with Gen. Laws, Chap. 12, sec. 3, I hereby request you to take appropriate proceedings in the courts of the United States and such other courts as you may deem expedient to assert [fol. 1153] and establish the title of the Commonwealth in and to the aforesaid land together with any other land and property to which the Commonwealth may be similarly entitled under such royal grants or the said Hartford Treaty, or otherwise.

Very truly yours, Channing H. Cox.

[fol. 1154] PLAINTIFF'S EXHIBIT 63. H. A. Edgecomb, Court Reporter

Resolves of 1828, c. XLVII, January Session

Resolve on the Petition of Robert Troup and Others, January 26, 1828

On the petition of Robert Troup, Thomas L. Ogden, and B. W. Rogers, proprietors of lands in the State of New York:

Whereas, in the articles of agreement made on the sixteenth day of December, in the year one thousand seven hundred and eighty-six, between the Commonwealth of Massachusetts and the State of New York, concerning certain lands within the territorial jurisdiction of the State of New York, and whereof the State of Massachusetts had the preemptive right, and by which articles, the rights of these States were respectively ascertained and determined,—it was provided among other things, as follows:

Tenthly. The Commonwealth of Massachusetts may grant the right of preemption, of the whole, or of any part of the said lands and territories, to any person or persons, who, by virtue of such grant, shall have good right to extinguish, by purchase, the claims of the Native Indians: Provided, however, that no purchase from the Native Indians by any such grantee or grantees, shall be valid, unless the same shall be made in the presence of, and approved by, a Superintendent, to be appointed for such purpose by the Commonwealth of Massachusetts, and having no interest in such purchase, and unless such purchase shall be confirmed by the Commonwealth of Massachusetts.

Eleventhly. That the grantees of the said lands and territories, under the Commonwealth of Massachusetts, shall, within six months [fol. 1155] after the confirmation of their respective grants, cause such grants, or the confirmation thereof, or copies of such grants, or confirmations, certified or exemplified, under the seal of the Commonwealth of Massachusetts, to be deposited in the office of the Secretary of the State of New York, to the end that the same may be recorded there; and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said Secretary, their respective grants or confirmations, or the copies thereof, whichsoever may have been so deposited, without any charges or fees of office whatsoever: and every grant or confirmation, which shall not be so deposited, shall be adjudged void.

And whereas, for the reasons above set forth, and, in conformity to the said agreement between this Commonwealth and the State of New York, all deeds and grants made pursuant thereto, ought to be confirmed;—and, whereas Robert Troup, Thomas Ludlow Ogden and Benjamin W. Rogers, have represented, that they are the purchasers of certain tracts of land, which are included in the lands

and territories aforesaid, and are entitled, under said articles of agreement, to have their purchase confirmed on the part of this Commonwealth, wherefore.

Resolved, That His Excellency the Governor, by and with the consent and advice of the Council, be, and he hereby is authorized and empowered to confirm the aforesaid purchase of said petitioners, provided the same shall appear to His Excellency to have been made in conformity to the said articles of agreement; and also to confirm in like manner, for, and in behalf of this Commonwealth, all other purchases, which have been made, or which may hereafter be [fol. 1156] made, in conformity to said articles of agreement, and to certify such confirmations in such form and manner, under the seal of this Commonwealth, as His Excellency may think proper to carry the aforesaid articles of agreement into full effect.

[fol. 1157] PLAINTIFF'S EXHIBIT 64. H. A. Edgecomb, Court Reporter

The Charters and General Laws of the Colony and Province of Massachusetts Bay. Published by Order of the General Court. Boston: 1814

Chapter LXIII

Acts Respecting Liberties in Common as to Flats, &c., to Pass Over Lands, and to Remove Out of the Colony

Sect. 1. It is ordered, by this court decreed and declared; that every man, whether inhabitant or foreigner, free or not free, shall have liberty to come to any publick court, council, or town meeting, and either by speech or writing, to move any lawful seasonable, or material question, or to present any necessary motion, complaint, petition, bill, or information, whereof that meeting hath proper cognizance, so it be done in convenient time, due order, and respective manner. (1641.)

Sect. 2. Every inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell, unless the freemen of the same town or the general court have otherwise appropriated them:

Provided, that no town shall appropriate to any particular person or persons, any great pond, containing more than ten acres of land, and that no man shall come upon another's propriety without their leave, otherwise than as hereafter expressed.

The which clearly to determine;

Sect. 3. It is declared, that in all creeks, coves, and other places about and upon salt water, where the sea ebbs and flows, the pro- [fol. 1158] prietor, or the land adjoining, shall have propriety to

the low water mark, where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further:

Provided, that such proprietor shall not by this liberty have power to stop or hinder the passage of boats or other vessels, in or through any sea, creeks or coves, to other men's houses or lands.

Sect. 4. And for great ponds lying in common, though within the bounds of some town, it shall be free for any man to fish and fowl there, and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow. (1641.47.)

Sect. 5. Every man of, or within this jurisdiction, shall have free liberty (notwithstanding any civil power) to remove both himself and his family, at their pleasure, out of the same; provided there be no legal impediment to the contrary. (1641.)

[fol. 1159] PLAINTIFF'S EXHIBIT 65. H. A. Edgecomb, Court Reporter

Acts 1786, January Session. Page 459

Report of Committee Relative to Settlement of Controversy Between the Commonwealth of Massachusetts and the State of New York, Respecting Lands Lying to the Westward of Hudson's River.

(The following report was printed in previous editions at the end of May session 1787. Taken from court record.)

The Committee of both Houses appointed to consider the Governor's message of the 13th inst. relative to the settlement of a controversy between this Commonwealth and New York, respecting lands lying to the westward of Hudson's River, made by the Commissioners appointed for that purpose, together with the papers accompanying have attended that service.

Your Committee have examined the agreement entered into and signed by the said Commissioners, and the plan descriptive of the lands in question, and find, that the right of this Commonwealth, to a large tract of land containing many millions of acres is by the said agreement clearly established.

That this controversy, which has been long in its duration; intricate in its nature, as well as important in its consequences, has been conducted, and finally closed, in an amicable manner, and by mutual agreement, is a pleasing circumstance, and will, we trust, contribute to cherish and maintain friendship and harmony between this, and our sister State: And the Commissioners on our part, in conducting this important business, are, in the opinion of your Committee, justly entitled to the approbation of the General Court.

Your Committee apprehend it necessary that the agreement above [fol. 1160] referred to, be printed with the resolves of the present session, and also recorded, with the commission from Governor Clinton, in the Secretary's office, and there lodged, together with the afore-mentioned plan; and that it will be expedient hereafter, to appoint a Superintendent, as well to superintend the purchase of Indian rights, as to investigate the situation, quality, value and contents of said lands, and to give information to the General Court from time to time respecting the same. The resolve relative to the release of certain lands included in the aforesaid agreement, your Committee have not considered, as they found that Samuel Brown had preferred a petition to the General Court, on the subject matter of it.

As the running and ascertaining the line of jurisdiction, between this State and New York, is not compleated, as appears by the letter of Doctor Samuel Williams, accompanying the said message, and the powers given to the Commissioners appointed by Congress, relative thereto, will expire on the 7th of March next, we conceive it expedient, that a bill be brought in for extending their powers to a further time. All which is submitted.

Cotton Tufts, per Order.

Read and accepted.

The text of the Agreement follows—pp. 460-467.

[fol. 1161] PLAINTIFF'S EXHIBIT 66. H. A. EDGECOMB, COURT REPORTER

Resolves, 1790, Chapter 44

Resolve Appointing a Committee to Make a Final and Absolute Settlement with the Hon. Nathaniel Gorham and Oliver Phelps, Esqrs., Relative to their Bond

Resolved, that Saml. Phillips, Walter Spooner & the Hon. David Cobb., Esqrs., Thomas Davis & William Eustis, Esqrs. be a committee with full power to make a final & absolute settlement with the Hon-ble Nathl. Gorham and Oliver Phelps Esqrs. relative to the Bond for one hundred thousand Pounds in State Notes, given by the said Gorham & Phelps to this Commonwealth; the said Committee to make report of their doings to the Genl. Court in fourteen days from the passing of this Resolve.

February 16, 1791.

[fol. 1162] PLAINTIFF'S EXHIBIT 67. H. A. EDGECOMB, COURT REPORTER

Resolves, 1790, January Session, Chapter 156

Committee Appointed to Settle with Nathaniel Gorham and Oliver Phelps, Esq., Continued in Commission to Make Report

Resolved that the Committee appointed to make a final & absolute settlement with the Hon. Nathaniel Gorham & Oliver Phelps Esqrs. relative to their bond for one hundred thousand pounds in the consolidated Securities of this Commonwealth, be & they hereby are continued in the said Commission and directed to make report of their proceedings in this business on the second Wednesday of the first session of the next general court.

March 11, 1791.

[fol. 1163] PLAINTIFF'S EXHIBIT 68. H. A. EDGECOMB, COURT REPORTER

Resolves, 1805, May Session, Chapter 47

Resolve on the Petition of David A. Ogden

Upon the petition of David A. Ogden relative to Land purchased of the State by Robert Morris Esquire.

Whereas the Honorable Oliver Wendell Esquire the only surviving Trustee appointed to hold certain papers relative to the sale of Land situate in the Gennessee Country formerly owned by the State & purchased by Robert Morris Esquire, has the custody of sundry papers relating to said sale which the petitioner prays may be filed or deposited in the office of the Secretary of the Commonwealth, and it being proper from the interest which the Commonwealth has in said papers that the same should be so disposed of:

Resolved, That the Secretary of the Commonwealth be and hereby is ordered to receive from the Honorable Oliver Wendell Esq. the papers in his possession relating to said sale and to file or deposit the same in his office among other papers there deposited relating to said sale to said Morris.

June 15, 1805.

[fol. 1164] PLAINTIFF'S EXHIBIT 69. H. A. EDGECOMB, COURT REPORTER

St. 1859, Chapter 223

An Act in Relation to Conveyances of Lands or Flats Belonging to the Commonwealth

Be it enacted, &c., as follows:

Section 1. All conveyances hereafter made of land or flats of the Commonwealth shall be subject to the approval of the governor and

council; and any conveyance made or to be made under the provisions of chapter two hundred and ten of the acts of eighteen hundred and fifty-nine, shall be included under the provisions of this act. But in case any such conveyance be required by the award of the commissioners named in section fourth of said act, and the same shall not be made within sixty days from the date of said award, then the third and fourth sections of said act shall be null and of no effect; and if for that or any other cause, said act should fail to have full and complete effect, then the enactment of said act shall not be deemed to prejudice any rights of the Commonwealth or of the city of Boston.

Section 2. This act shall take effect from and after its passage.

Approved April 6, 1859.

[fol. 1165] STATE OF NEW YORK,
Office of the Secretary of State, ss:

It is hereby certified, That the following entries are endorsed upon the original Treaty of Cession between Massachusetts Colony and the State of New York, dated December 16, 1786 remaining on file in this office in Vol. 1 of Miscellaneous Files, at pages 179, 180, 181 and 182:

Be it remembered that on this thirtieth day of January in the Year of our Lord one thousand seven hundred and Eighty seven Personally appeared before me Richard Morris Esquire Chief Justice of the State of New York, Jeremiah Wadsworth and Lewis Buboys Esquires two of the Subscribing Witnesses to the within Instrument who being by me duly sworn, did severally depose and say that they were present and did see the within named James Duane, Robert R. Levingston, Robert Yates, John Haring Melancton Smith Egbert Benson John Lowell James Sullivan Theophilus Parsons and Rufus King severally sign seal and deliver the within Instrument as their and each of their free and voluntary Act and Deed to and for the Uses and Purposes therein mentioned, and that George Wyllys Thomas Seymour Jesse Root, D. Humphreys William Imlay Simeon De Witt and Nathaniel Bethune the other subscribing Witness were also present and did tog*a*ther with the Depon*a*nts sign and subscribe their Names as Witnesses to the Execution thereof: And I having inspected the said Instrument and finding no Interlin*i*ations or material Erasures therein except those noted in the Body thereof to have made before the Execution thereof do al-ow the same to be recorded.

Ri'd Morris.

[fol. 1166] Secretary's Office of the State of New York, ss.

I certify that the within Instrument and Certificate are Recorded in the said office in Book of Miscellaneous Records endorsed M. R. A.

page 38, &c. Examined and Compared with the said Record Copy thereof this 2d Day of February, 1787, By Me

Robt. Harpur, D. Secry.

No. 60. Agreement between Massachusetts & New York, Decr. 16, 1786. 16th December, 1786. Agreement between the Commissioners of the Commonwealth of Massachusetts and Commissioners of the State of New York.

STATE OF NEW YORK,
Tompkins County, ss:

Be it remembered that on this twenty-fourth day of November in the year one thousand eight hundred and thirty four, before me the subscriber a Supreme Court Commissioner of the said State, personally appear'd Simeon De Witt who being by me duly sworn deposed that he saw James Duane Robert R. Livingston Robert Yates John Haring Melancton Smith Egbert Benson John Lowell James Sullivan Theophilus Parsons & Rufus King sign seal execute and deliver the within instrument at the time when the same bears date, that he at the same time subscribed his name thereto as a witness, and that the persons above named who executed the said instrument were each of them to him at the time well known to be the same [fol. 1167] individuals described in and who executed the said instrument; that the place of the permanent residence of the said Simeon De Witt is in the City of Albany altho he now temporarily resides in the village of Ithaca in the county of Tompkins aforesaid; and I further certify that the said Simeon De Witt is to me personally well known to be the same individual who was a subscribing witness to the said instrument as aforesaid, and that his residence is as above stated, and that the foregoing proof of the execution of the within instrument is to me entirely satisfactory evidence of the due execution thereof: I do therefore allow the same to be recorded.

Given under my hand at Ithaca aforesaid the day and year above mentioned.

W. D. W. Burger.

Ontario County Clerk's Office

Received for record 3d of January 1835 at 3 O'Clock P. M. and recorded in Liber 56 of deeds at folio 449, and examined.

F. J. B. Crane, Deputy Clerk.

Genesee County Clerk's Office

Recorded 19th February, 1835, at 10 o'clock A. M., in Liber 35 of Deeds at page 164 and examined.

Benjamin Pringle, Deputy Clerk.

Yates County Clerk's Office, ss.

Received for record 12th February, A. D. 1839, at 3 o'clock P. M. and recorded in Liber 14 of Deeds at folio 378, and examined.

A. Woodwirth, Clerk.

[fol. 1168] Erie County Clerk's Office, ss.

Recorded April 6th, A. D. 1835, at 8 o'clock A. M. in Liber 26 of Deeds at page 469, &c., and examined.

Horace Clark, Clerk.

Chautauqua County Clerk's Office, ss.

Recorded April 3d A. D. 1835, at ½ past 9 o'clock A. M. in Liber 14 of Deeds at page 316 &c. Examined &c.

G. W. Tew, Clerk.

Livingston County Clerk's Office

Received for Record March 27, 1835 at 4 o'clock P. M. and recorded in Liber 14 of deeds at page 133, and examined.

E. Clark, Clerk.

Cattaraugus County Clerk's Office, ss.

Recorded April 1st A. D. 1835 at 9 O'Clock A. M. in Liber 1 of Miscellaneous Records page 270 &c.

John W. Staunton, Clerk.

Niagara County Clerk's Office, ss.

Recorded the 7th day of April A. D. 1835 at 5 o'clock P. M. in Book of Deeds No. 11, on pages 555 & 556 &c. Examined.

A. H. Moss, Clerk.

[fol. 1169] Orelans County Clerk's Office, ss.

Recorded the 9th day of April A. D. 1835 at 12 o'clock M. in Book of Deeds No. 9 on pages 251 &c. Examined.

H. J. Sickels, Dep. Clerk.

Allegany County, Clerk's Office, ss.

Recorded March 30th 1835 at 9 O'clock A. M. in Liber B of Miscel-anious Records page 23 & examined.

J. W. Sherman, Clk.

Witness my hand and the seal of office of the Secretary of State at the City of Albany, this 7th second day of November, one thousand nine hundred twenty-three.

Herman Doctor, Second Deputy Secretary of State. (Seal of State of New York, Secretary of State.)

Ex. 70. H. A. Edgcomb, Court Reporter.

[fol. 1170] PLAINTIFF'S EXHIBIT 71. H. A. Edgecomb, Court Reporter

The Commonwealth of Massachusetts, Office of the Secretary

Boston, September 20, 1923.

I Hereby Certify that the following is a true copy from "Treaties, Contracts, &c.," Vol. 1, pages 117, 118, on file in the Archives Division of this office.

Witness the Great Seal of the Commonwealth.

Herbert H. Boynton, Deputy Secretary of the Commonwealth. (Seal of Sigillum Reipublicæ Massachusettensis.)

[fol. 1171] Treaties, Contracts, &c., Vol. 1, pp. 117, 118

Whereas the Commonwealth of Massachusetts by the Committee & agents of the same viz*t* Samuel Phillips Nathaniel Wells, David Cobb, William Eustis and Thomas Davis upon the twelfth day of March, now last past, by the deed of covenants of the same Commonwealth under the hands and seals of the same Committee, did for the consideration therein mentioned covenant & agree to sell and convey to me Samuel Ogden of Delaware works in the State of Pennsylvaniá esquire, all the pre-emptive and other right and title which the said Commonwealth had to certain lands situate in the State of New York, bounded and described in the deed of covenants aforesaid—and whereas the said Commonwealth by the same Agents and Committee have this day granted and sold the same right and title to the same lands to Robert Morris Esqr at my request. Now in consideration of the same, and for and in consideration of the sum of five shillings to me in hand paid I the said Samuel Ogden do release to the said Commonwealth the same covenants for conveying such right, and all cause and action for not making selling and conveying the same right to me according to the same covenants, and all demands for the same conveyance aforesaid, the sale and conveyance of said right to the said Robert Morris as aforesaid being in the place and stead of the deed mentioned in the same Covenants to be made to me, all other parts of the same Covenants to remain good and valid to the said Robert to whom I have assigned the same—In witness whereof I have hereunto affixed my hand and seal this eleventh day of May in the year of Our Lord One thousand seven hundred & ninety one.

Samuel Ogden (Seal.)

Signed and delivered in presence of David Morey, Thomas Wallcut.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

May 11th, 1791.

Then the said Samuel Ogden acknowledged the within to be his act and deed before me.

Ja Sullivan, Jus. Peace.

A true copy. Attest:

John Avery, junr., Secretary.

Ex. 71. H. A. Edgecomb, Court Reporter.

[fol. 1172] PLAINTIFF'S EXHIBIT 72. H. A. Edgecomb, Court Reporter

The Commonwealth of Massachusetts, Office of the Secretary

Boston, September 20, 1923.

I Hereby Certify that the following is a true copy from "Treaties, Contracts, &c.," Vol. 1, pages 111-116, on file in the Archives Division of this office.

Witness the Great Seal of the Commonwealth.

Herbert H. Boynton, Deputy Secretary of the Commonwealth.

(Seal Sigillum Reipublicæ Massachusettensis.)

[fol. 1173] Treaties, Contracts, &c., vol. 1, pp. 111-116

This indenture of two parts made and concluded upon the twelfth day of March in the year of Our Lord One thousand seven hundred and ninety one, by Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis esquires for & in behalf of the Commonwealth of Massachusetts on the one part and Samuel Ogden of Delaware works in the State of Pennsylvania esqr on the other part witnesseth.

That whereas the General Court of the said Commonwealth of Massachusetts, upon the eighth day of March instant by their Resolve of that date, did appoint the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis esquires a Committee with full power and authority to bargain and sell to the said Samuel Ogden esqr his heirs and assigns all & singular the right of pre-emption, and all other the title and interest of the same Commonwealth of Massachusetts in & unto all that tract of land lying in the State of New York the right of pre-emption whereof the State of New York, ceded, granted released and confirmed to the said Commonwealth of Massachusetts and their grantees, and to the heirs and assigns of such grantees forever, saving and excepting

such part or parts of the same tract the right of pre-emption whereof this Commonwealth has ceded and granted to the United States of America; & also saving & excepting such part or parts of the same tract, the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps esquires, their heirs and assigns by virtue of any grant & confirmation from the said Commonwealth of Massachusetts, however the same is or may be bounded or described; also reserving one undivided sixtieth part of the said tract, excepting such parts thereof as now belong to the United States and said Gorham and Phelps by virtue of any cession & confirmation from the said Commonwealth of Massachusetts for the consideration of one hundred thousand pounds lawfull money of said Commonwealth of Massachusetts, to be paid in the following manner, to wit—Seven thousand five hundred pounds thereof to be paid within three months from the time a deed shall be made and executed by the said Committee to the said Samuel Ogden of the pre-emptive right, and all other right which the Commonwealth of Massachusetts aforesaid hath to the premises—seven thousand [fol. 1174] five hundred pounds within six months from the time of making & executing such Deed—and fifteen thousand pounds annually from the time aforesaid, until the said sum of one hundred thousand pounds lawful silver money of said Commonwealth of Massachusetts, shall be paid, with interest upon the same sums aforesaid, which shall not be paid within six months from the time of making such deed, that is to say, upon the whole sum of one hundred thousand pounds from and after the expiration of the six months aforesaid untill the whole shall be paid, at the rate of six per centum per annum.

In pursuance and by virtue of which authority aforesaid the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis on the part and behalf of the said Commonwealth of Massachusetts do covenant & agree to and with the said Samuel Ogden in consideration of his covenants and agreements herein mentioned and expressed, and in consideration of his having paid into the Treasury of the said Commonwealth of Massachusetts the sum of fifteen hundred pounds lawful money of the same, which is to be considered as a part payment of the sum of seven thousand five hundred pounds first abovementioned, that We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis will make & execute to him the said Samuel Ogden, his heirs and assigns, a good and valid deed of the pre-emptive, and all others right and title which the said Commonwealth of Massachusetts hath to the premises which are bounded and described as follows—to wit—All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie, and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east from the northern termination of said streight or waters, and which premises to be conveyed, are to extend on the line of said

tract belonging to the State of New York to the south shore of lake Ontario, then bounding northerly on that part of lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending until [fol. 1175] a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth of Massachusetts by an Act of the Legislature thereof passed the twenty-first day of November seventeen hundred and eighty-eight—And the said premises to be bargained & sold as aforesaid by virtue of the powers contained in the Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so upon that line westwardly to the place of beginning where that line meets the tract lately ceded by the said United States to the said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof, which same deed We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis for and in behalf of the same Commonwealth do covenant and agree to make and execute to the said Samuel Ogden in manner aforesaid at any time within sixty days from the date of these presents, upon his procuring to be executed and delivered to us six bonds, signed, sealed and delivered before two or more subscribing witnesses, to the said Commonwealth of Massachusetts by himself, and Robert Morris of the City of Philadelphia in the State of Pennsylvania esq^{r} and Jeremiah Wadsworth of Hartford in the County of Hartford and State of Connecticut esq^{r} one of which shall be for the sum of Twelve thousand pounds, conditioned for the payment of six thousand pounds lawful money of the said Commonwealth of Massachusetts upon or before the eleventh day of August next, with interest from that time till paid,—One other for the sum of Fifteen thousand pounds, conditioned for the payment of seven thousand five hundred pounds to the said Commonwealth of Massachusetts, upon or before the eleventh day of November next with interest as aforesaid at the rate aforementioned, from the said eleventh day of November until the same shall be paid—One other bond for thirty thousand pounds conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May in the year of Our Lord, One thousand seven hundred & ninety two, with interest from and after the eleventh day of November aforesaid—And one other bond for thirty thousand pounds, conditioned for the payment of [fol. 1176] fifteen thousand pounds upon or before the eleventh day of May which will be in the year of Our Lord, One thousand seven hundred and ninety-three, with interest from the said eleventh day of November, until paid—And one other bond for thirty thousand pounds conditioned for the payment of fifteen thousand pounds to the said Commonwealth of Massachusetts upon or before the eleventh day of May, in the year of Our Lord One thousand seven hundred and ninety-four, with interest, at the rate abovementioned, from and after the eleventh day of November aforesaid, until paid—And one other bond of thirty thousand pounds conditioned for the payment

of fifteen thousand pounds upon or before the eleventh day of May, which will be in the year of our Lord, One thousand seven hundred and ninety-five, with interest for the same from and after the eleventh day of November aforesaid at the rate aforesaid,—And one other Bond for thirty thousand pounds conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May in the year One thousand seven hundred and ninety-six with interest as the rate aforesaid from & after the said eleventh day of November aforesaid until paid: And one other bond for Twenty thousand pounds conditioned for the payment of ten thousand pounds upon or before the eleventh day of May in the year One thousand seven hundred and ninety-seven, with interest at the rate aforesaid from said eleventh day of November aforesaid, until paid, or on the delivery of any other personal security to the acceptance of us the said Samuel, Nathaniel, David, William and Thomas & also a deed of mortgage from him the said Samuel Ogden of the lands to be conveyed by the deed aforesaid as a collateral security for the payment of all the sums aforesaid, with the arising interest thereon. And we the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis and Thomas Davis by virtue of the powers to us given as aforesaid, do in behalf of, & for the said Commonwealth of Massachusetts covenant with the said Samuel Ogden that upon his giving unto the said Commonwealth of Massachusetts all the securities real and personal aforesaid, as aforesaid, that we will enter into & make & seal unto him, his heirs, executors, administrators & assigns for and on behalf of the said Commonwealth of Massachusetts certain covenants that the said Commonwealth of Massachusetts shall from time to time by good and effectual deed or deeds of release, [fol. 1177] release to him his heirs and assigns, all right arising to the said Commonwealth of Massachusetts by virtue of the mortgage deed to be given as aforesaid, to such part and parcels of the land therein contained (quantity & quality being considered) as shall be in proportion, as the said Ogden, Morris, and Wadsworth their heirs, executors or administrators, or the heirs executors or administrators of either of them, shall pay & discharge of the principal of the said obligations, together with the interest due on such payment, which deed or deeds of release shall be for such part or parcels in severalty from the remainder, and in such place or places as the said Ogden his heirs or assigns shall choose, determine upon and fix by actual survey. And also that the said Commonwealth of Massachusetts shall from time to time appoint a Superintendent with powers to approve of any purchase or purchases which may be made by the said Odgen his heirs or assigns of the claims of the native Indians, he paying such Superintendent for his services.

In consideration of all which he the said Samuel Ogden covenants and agrees upon his part, that unless he shall procure & deliver to the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis and Thomas Davis for the use of the Commonwealth of Massachusetts, all the bonds made & executed to the said Commonwealth of Massachusetts as aforesaid for the sums aforesaid, or other personal security for the same several sums aforesaid to the

acceptance of the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis, & also the deed of mortgage aforesaid for the lands aforesaid, as collateral security for the several sums aforesaid within sixty days from the date of these covenants, the said sum of fifteen hundred pounds paid to the Treasurer of the Commonwealth of Massachusetts aforesaid shall be forfeited and remain to the use of the said Commonwealth of Massachusetts.

Provided nevertheless that the said Samuel Ogden his Executors or Administrators or the said Robert Morris and Jeremiah Wadsworth or their executors or administrators, or the executors or administrators of either of them may at any time, within the several times limited and fixed for the several payments aforesaid, pay to the said Commonwealth of Massachusetts the whole, or any part of [fol. 1178] the sums aforesaid, over & above the sums at such time due upon either or any of the bonds aforesaid—In witness of all which the parties have hereunto set their hands and seals the day and year aforesaid.

Samuel Ogden (Seal), Samuel Phillips (Seal), Nathaniel Wells (Seal), David Cobb (Seal), William Eustis (Seal), Thomas Davis (Seal).

Sealed, signed, and delivered in presence of Thomas Wallcut, David Morey.

I approve of the above security as adequate.

James Sullivan.

A true copy. Attest:

John Avery, Jun'r, Secretary.

[fol. 1179] Plaintiff's Exhibit 73. H. A. Edgecomb, Court Reporter

The Commonwealth of Massachusetts, Office of the Secretary

Boston, September 19, 1923.

I Hereby Certify that the following is a true copy of a copy of the "Indenture between the Commonwealth of Massachusetts & Messrs. Gorham & Phelps—March 10, 1791," on file in the Archives Division of this office.

Witness the Great Seal of the Commonwealth.

Herbert K. Boynton, Deputy Secretary of the Commonwealth.

(Seal of Massachusetts.)

[fol. 1180] Indenture Between the Commonwealth of Massachusetts & Messrs. Gorham & Phelps, March 10, 1791

(Copy)

This indenture of two parts made & concluded upon this tenth day of March in the year of our Lord one Thousand seven hundred & ninety one by the Commonwealth of Massachusetts upon the one part, & Nathaniel Gorham of Charlestown in the County of Middlesex & Commonwealth aforesaid Esquire. & Oliver Phelps of Suffield in the County of Hartford & State of Connecticut esq. on the other part witnesseth

That Whereas the said Gorham & Phelps with Others, made their Bond or writing obligatory, bearing date the twentieth day of October in the Year of our Lord One Thousand seven hundred & eighty-eight to Alexander Hodgdon Esq. Treasurer of the same Commonwealth or to his Successors in the said Office conditioned for the payment of One hundred Thousand pounds in the Consolidated Securities of the said Commonwealth in one year from the first day of April 1788 with lawful interest for the same in like Consolidated Securities; And Whereas the Legislature of the same Commonwealth did by their Resolve which passed the House of Representatives the sixteenth day of February & was approved by the Governor on the nineteenth of the same Month in the present Year constitute & appoint Samuel Phillips, Walter Spooner, David Cobb, Thomas Davis & William Eustis esquires a Committee with full powers to make a final settlement with the said Gorham & Phelps relative to the said Bond; which Committee having attended upon the business, have agreed with the said Gorham & Phelps, that the said Commonwealth shall receive, & the said Gorham & Phelps have agreed to pay six shillings lawful silver money of the same Commonwealth for every twenty shillings of the Sum expressed in the condition of the bond aforesaid, upon which method of computation & manner of agreement aforesaid there appears to be due to the said Commonwealth (after deducting the payments made on said bond prior to the date of this Indenture, & the further sum of six Thousand pounds, being the Amount of one Year's Interest on the said Bond remitted & discharged by the said Commonwealth by their Indenture of agreement with the said Gorham & Phelps bearing date the ninth day of June [fol. 1181] last past) the sum of twenty-nine Thousand one hundred & forty-six pounds, one shilling & six pence, which sum last mentioned so found due, the said Gorham & Phelps agree to pay, discharge, & secure in manner following, viz*t*.

To pay six Thousand pounds in hand to the Treasurer of the said Commonwealth & to assign to the said Commonwealth one bond of Roberts Morris, dated the eighteenth day of October last for the sum of five Thousand & forty one pounds, thirteen shillings & four pence, including Interest due thereon at this present day & one other Bond of the said Morris of the same date, payable on the thirty first day of December, One Thousand seven hundred & ninety two

for the sum of twelve Thousand seven hundred & eight pounds six shillings & eight pence with interest after the first day of September One Thousand seven hundred & ninety two which last mentioned Bond is estimated by the parties to this Indenture to be worth at the present day the sum of twelve Thousand one hundred & thirty six pounds nine shillings & two pence; & for the balance remaining, to wit, the sum of five Thousand, nine hundred & sixty seven pounds, nineteen shillings, & for the interest thereof the said Gorham & Phelps have deposited with the Attorney General of said Commonwealth promis-ory notes of hand against divers persons, the contents of which are to be by him recovered & paid into the Treasury of the said Commonwealth as the same may be recovered, Now the said Commonwealth by the said Samuel Phillips, Walter Spooner, David Cobb, Thomas Davis, & William Eustis their Committee & Agents appointed as aforesaid, do covenant, grant & agree to & with the said Nathaniel Gorham & Oliver Phelps, their heirs, executors & administrators that the same Commonwealth, shall & will receive of them or either of them the sum of six shillings in the lawfully money of this Commonwealth for each twenty shillings expressed in the condition of their bond aforesaid for the payment of One hundred Thousand pounds & interest in consolidated Securities as aforesaid. And the said Commonwealth by the Committee & Agents aforesaid do further covenant & agree with the said Gorham & Phelps that upon their assigning to the said Commonwealth a certain deed of mortgage made to them the said Gorham & Phelps, by the said Robert Morris, bearing date the eighteenth day of October last, which was given by the said Morris as collateral security for the payment of his Bonds [fol. 1182] aforesaid (the same lands in the same deed contained being free of all incumbrances) the Commonwealth shall discharge so much of the bond given by the said Gorham & Phelps to the Commonwealth aforesaid as the two bonds before recited given to them by the said Morris, & assigned by the said Gorham & Phelps as aforesaid, shall according to the value herein before computed amount to—

And whereas the said Gorham & Phelps have drawn their bill of Exchange upon William Burgess of London in favor of the said Alexander Hodgdon Treasurer of the said Commonwealth, & his Successor or Successors in the same Office for the sum of twelve Thousand, eight hundred & eighty three pounds, eleven shillings & ten pence sterling money of Great Britain equal to seventeen Thousand one hundred & seventy eight pounds two shillings & six pence lawful money of said Commonwealth the said Commonwealth by the Agents aforesaid do grant to & covenant with the said Gorham & Phelps, their executors & Administrators, that all sums of money which shall be received by the said Treasurer upon the same Bill of exchange, shall be applied to the payment of the bonds aforesaid, given by the said Robert Morris & assigned as aforesaid by the said Gorham & Phelps to the said Commonwealth, as soon as such sums shall be so received And the said Gorham & Phelps for themselves, their heirs, executors & administrators do covenant & agree to & with the said Commonwealth, that if the sums which now

are & which shall be due upon, or are agreed to be paid by the condition of the same bonds so assigned as aforesaid, shall not be paid to the said Commonwealth on or before the first day of March which will be in the year of our Lord One Thousand seven hundred & ninety two, then they the said Gorham & Phelps, or their heirs, executors, or administrators shall & will assign & convey by a good & lawful Deed of assignment, the lands contained in the mortgage deed made by the said Robert Morris to them the said Gorham and Phelps as a collateral security for the payment of the same bonds assigned as aforesaid; & that they the said Gorham & Phelps, their heirs, executors, or administrators will vest in the same Commonwealth, the lands contained in the said Deed of mortgage in fee, & in mortgage as a collateral security for the monies engaged in the [fol. 1183] same bonds assigned as aforesaid, with all full & necessary powers for the recovery of the possession of the same or for the recovery of the monies due upon the same bonds, or engaged thereby, in any Court, or before any tribunal where the same may be brought according to the laws which do or may relate to the same, in as full & ample a manner as the said Gorham & Phelps, now have or hereafter may have authority or right to demand the possession of the same lands, or any money, profits or privileges arising from the same mortgage; & the said Gorham & Phelps do further covenant & agree to & with the Commonwealth aforesaid that they, their heirs, executors & administrators shall & will continue to the said James Sullivan, Attorney General of the said Commonwealth full power & authority to sue for, recover, & receive the contents of the promis-ory Notes of hand deposited as aforesaid with him for the use & purpose aforesaid, until ye. bond given by the said Gorham & Phelps & Others to the said Commonwealth shall be discharged. And they the said Gorham & Phelps do further agree & covenant for themselves, their executors & administrators that the liquidation & settlement of their Bond aforesaid to the said Alexander Hodgdon Treasurer of the same Commonwealth for One hundred Thousand pounds in consolidated Securities of the same Commonwealth, shall be binding upon them, & that agreeably thereto there is now due to the Treasurer of the said Commonwealth, on their bond aforesaid the sum of twenty nine Thousand, one hundred & forty six pounds, one shilling & six pence—And the said Commonwealth do also covenant & agree to & with the said Gorham & Phelps that if any advantage shall arise upon the bill drawn upon the said William Burgess by reason of exchange on London being above par, then all such advantages shall be carried to the credit of the said Gorham & Phelps & be discounted in the final payment of their bond aforesaid for the payment of one hundred Thousand pounds which is to be in [force, according to the ad]justment & liquidation aforesaid (this covenant or any of the securities or assignments before mentioned notwithstanding) until the same shall be actually paid by the assignments & negotiations aforesaid, or in some other manner.

And the said Gorham & Phelps do further agree that if in the negotiation of the same bill drawn upon the said Burgess as aforesaid, [fol. 1184] there should be any loss by said Bill being sold below

or under par that such loss shall be borne by them the said Gorham & Phelps & be allowed and paid out of the monies so to be collected upon the promis-ory notes so deposited as aforesaid with the said Attorney General. In witness whereof, the parties, have hereunto, interchangeably set their hands & seals this tenth day of March One Thousand seven hundred & ninety-one.

Nathl. Gorham & a seal, Oliver Phelps & a seal, Saml. Phillips & a seal, David Cobb & a seal, Thos. Davis & a seal, William Eustis & a seal.

Signed, sealed & delivered in presence of Nathl. Wells, Leo. Jarvis.

Treasury Office, Boston 27th, May, 1791.

I Certify that the beforewritten is a true Copy of the Original, lodged in this Office by the Committee of the General Court & the twenty thousand Dollars within mentioned has been paid into ye. Treasy. Office

Alexr Hodgdon, Treasr.

[fol. 1185] DEFENDANTS' EXHIBIT 1

This indenture of sixteen parts made the fourth day of October in the year of our Lord One thousand eight hundred and four.

Between Sir William Pulteney of the County of Middlesex in the United Kingdom of Great Britain and Ireland Baronet of the first part. William Hincher of the County of Genesee in the State of New York of the second part, Joseph Annin of the County of Cayuga in the State of New York, of the third part, Horatio Jones of the County of Ontario in the State of New York of the Fourth part, Oliver Phelps of the said County of Ontario of the fifth part, Nathaniel Norton of the said County of Ontario and Birdsey Norton of the Town of Goshen in the State of Connecticut of the sixth part, Sturgin Sloan of the County of Columbia in the State of New York of the seventh part, William Adams of the County of Ontario in the State of New York of the eighth part, Benjamin Crosby of the County of Steuben in the State of New York and Mary Crosby his wife of the ninth part, John Wilson of the Province of Upper Canada of the tenth part, John Love of the County of Onondaga in the State of New York of the Eleventh part, Willm Decheze of the Province of Upper Canada of the twelfth part, Samuel Hutchinson of the City of Washington of the thirteenth part, Robert Norris of the County of Ontario in the State of New York of the fourteenth part, Isaac Maltby of the County of Hampshire in the State of Massachusetts of the Fifteenth part, and John Allis of the County of Hampshire in the State of Massachusetts.

Whereas the said parties at and immediately before the enscalin and delivery of these presents are seized in fee simple as tenants in common of All that certain piece or tract of land situate lying and being in the County of Genesee and known and distinguished

by Township Number Two in the Short Range west of the Genesee River in said County and whereas the said parties have agreed to make Partition of the said Township according to their respective [fol. 1186] rights and interests therein in manner and form following that is to say that the said Sir William Pulteney his Heirs and Assigns shall have and enjoy to the only proper use Benefit and behoof of him the said Sir William Pulteney his Heirs and Assigns forever the following Lots and parts of lots in the first Division of Lots in the said Township, according to a survey and map of the same made by William Shepard hereunto annexed and to which reference is herein had that is to say Lots numbers Eighteen, Forty-eight, four, forty-five, seven, twenty-seven, thirty-six, fifty-six, five, twenty-four, sixteen, fifty-eight, fifty-nine, fifty-two, two, twenty-three, Eleven, Thirty-one, fifty, twenty-one, ten, twenty, one, fifty-three, nineteen, thirty two, twenty five, One hundred acres in the center of Lot Number thirty five bounding on the east by lands laid off for the said Sturgeon Sloan on the west by lands laid off for the said Nathaniel Norton and Birdsey Norton, and on the north and south by the north and south lines of the lot, One hundred and twelve acres to be laid off on the west end of lot number fifty seven by a line running parallel with the west line of the said lot, and lot number forty-six excepting seventy five acres on the east part thereof laid off for the said Benjamin and Mary Crosby, and one hundred and twenty-seven acres on the west end of lot number forty nine to be laid off by a line running parallel with the west line of the said lot. Also the following lots in the second division of lots in the said Township that is to say Lots numbers Eleven, fourteen, three, twenty four, twenty three, seven, twelve, nineteen, thirty two, one, twenty five, thirty four, eighteen, two, six, thirty and ten and the following town lots in the said Township that is to say lots numbers three, twenty-six, twenty seven, twelve, thirty five, thirty eight, twenty-five, twenty one, one, thirty two, twenty, thirty four, thirty one, nine, ten, thirteen, four and six. And that the said William Hincher his *His* Heirs and As- [fol. 1187] signs shall have and enjoy to the only proper use Benefit and Behoof of the said William Hincher his heirs and assigns forever Lot number seventeen in the first division of lots in the said Township according to the map and survey aforesaid, Lots numbers nine, sixteen, and twenty-eight, in the second division of lots, and town lots numbers twenty eight, and thirty three. And that the said Joseph Annin his Heirs and Assigns shall have and enjoy to the only proper use benefit and behoof of the said Joseph Annin his Heirs and Assigns forever Lots numbers thirty eight, there, fourteen, sixty-two, sixty, the east half of lot number thirty nine, the east half of lot number eight and eighty six acres on the east end of lot number fifty seven in the first division of lots in the said Township according to the map and survey aforesaid, Lots numbers thirteen and twenty-one in the second division of lots and Town lots numbers eighteen and thirty seven. And that the said Horatio Jones his Heirs and Assigns shall have and en-

joy to the only proper use benefit and behoof of the said Horatio Jones his heirs and assigns forever, lots numbers thirty, thirteen, sixty one, the west half of lot number eight and eighty six acres in the center of lot number fifty seven bounded on the west by lands laid off for Sir William Pulteney and on the east by lands laid off for the said Joseph Annin, in the first division of lots in the said Townships, lots numbers twenty, and twenty two; in the second division of lots and town lots numbers seventeen and twenty nine. And that the said Oliver Phelps, his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said Oliver Phelps his heirs and assigns forever lots numbers twenty nine, forty-four, twenty-two, forty three and one hundred and forty acres on the east end of lot number nine in the first division of lots, lots numbers seventeen, thirty-one and twenty six in the second division of lots. Town lots numbers Eleven, nineteen, [fol. 1188] eight, fifteen and thirty—and that the said Nathaniel Norton and Birdsey Norton, their heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said Nathaniel and Birdsey their Heirs and Assigns forever, lots numbers twenty six, fifty five, fifteen, one hundred acres and three quarters on the west end of lot number thirty five, and sixty nine acres on the east end of lot number six, in the first division of lots—lots number four, five and fifteen in the second Division of lots and Town lots numbers five, twenty-two and thirty-nine—And that the said Sturgin Sloan his Heirs and Assigns shall have and enjoy to the only proper use benefit and behoof of the said Sturgin Sloan, his heirs and assigns forever, lots numbers forty, thirty-seven, twelve, the west half of lot number thirty-nine, one hundred acres on the east end of lot number thirty-five, and one hundred and fifty two acres on the west end of lot number nine in the first division of lots—lots number thirty three in the second division and town lots numbers seven and twenty four—and that the said William Adams his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said William Adams his heirs and assigns forever lots numbers twenty eight, and forty seven in the first division of lots and town lot number thirty six—and that the said Benjamin Crosby and Mary his wife their heirs and assigns forever, lots number fifty four, fifty one, forty one, seventy five acres on the east end of lot number forty-six and one hundred and fifty two acres on the east end of lot number forty nine in the first division of lots, lot number eight in the second division of lots, and Town lots numbers fourteen and sixteen—And that the said John Wilson his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the [fol. 1189] said John Wilson his heirs and assigns forever, Two hundred acres on the west end of lot number thirty three in the first division of lots—and that the said John *love* his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said John Love his heirs and assigns forever, Two hundred acres on the west end of lot number thirty four in the

first division of lots—and that the said Samuel Hutchinson and Sarah his wife shall have and enjoy to *to* the only proper use benefit and behoof of the said Samuel and Sarah their heirs and assigns forever fifty acres on the southeast corner of lot number thirty three in the first division of lots as laid down on the map aforesaid, and that the said Robert Norris his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said Robert Norris his heirs and assigns forever, fi-ty acres on the northeast corner of lot number thirty three in the first division of lots as laid down on the map aforesaid. And that the said Isaac Maltby his heirs and assigns forever lot number six in the first division of lots except-ng sixty nine acres on the east end of the same laid off for Nathaniel Norton and Birdsey Norton—and that the said John Allis his heirs and assigns shall have and enjoy to the only proper use benefit and behoof of the said John Allis his heirs and assigns forever, Lots numbers twenty seven and twenty nine in the second division of lots and Town lot number two—and that the said William Decheze his heir- and assigns shall have and enjoy to the only proper use benefit and behoof of the said William Decheze his heirs and assigns forever, One hundred acres on the east end of lot number thirty four in the first division of lots in the said township according to the map and survey aforesaid.

[fol. 1190] Now this indenture witnesseth that the said parties to these presents in consideration of the premises and of the sum of One Dollar received by each of the said parties from the others the receipt whereof they do hereby acknowledge have given, granted, bargained, sold, released and confirmed unto each other respectively and by these presents do give, grant, bargain, sell, release and confirm unto each other respectively and to their and each of their respective Heirs and Assigns forever the aforesaid several lots, pieces or parcels of the aforesaid tract of land as aforesaid in the partition aforesaid allotted to each of the said respective parties in severalty.

To have and to hold the said respective lots, pieces or parcels of the aforesaid tract of land with the appurtenances unto the said respective parties, their heirs and assigns, to the only proper use benefit and behoof of the said parties their Heirs and assigns respectively in severalty forever.

In witness whereof the parties to these presents that is to say the said Sir William Pulteney by Robert Troup his attorney, the said Benjamin Crosby and Mary his wife and the said William Hincher for themselves, the said Joseph Annin, Horatio Jones, Nathaniel Norton and Birdsey Norton, Sturgin Sloan, William Adams, John Wilson, John Love, Samuel Hutchinson and Sarah his wife, Robert Norris and Isaac Maltby and Oliver Phelps by Thomas Morris their attorney, the said John Allis by Israel Chapin his attorney and the said William Decheze by Ebenezer Merry his attorney, have here-

unto interchangeably set their hands and seals the day and year first above written.

[fol 1191] John Allis, by His Atty., Israel Chapin. (L. S.) Sturgin Sloan. by Thomas Morris, His Attorney. (L. S.) William Adams, by Thomas Morris, His Attorney. (L. S.) John Wilson, by Thomas Morris, His Attorney. (L. S.) John Love, by Thomas Morris, His Attorney. (L. S.) Samuel Hutchinson and Sarah Hutchinson by Their Attorney, Thomas Morris. (L. S.) Robert Norris, by His Attorney Thomas Morris. (L. S.) Isaac Maltby, by His Attorney, Thomas Morris. (L. S.) Oliver Phelps, by His Attorney, Thomas Morris (L. S.) Sealed and delivered in presence of John Greig, Nat. W. Howell. William Pulteney, by Robt. Troup, His Atty. (L. S.) Sealed and delivered by Sir William Pulteney, by Robert Troup, His Attorney, in the presence of us, Js. Fellows, Evert A. Bancker, Samuel Colt. Benjamin Crosby. (L. S.) Mary Crosby. (L. S.) William Hincher. (L. S.) Joseph Annis, by Thomas Morris, His Attorney. (L. S.) Horatio Jones, by Thomas Morris, His Attorney. (L. S.) Nathanie- Norton, Birdsey Norton, by Their Attorney, Thomas Morris, Their Attorney. (L. S.) Sealed and delivered by Wm. Dechaeze in presence of —— ——. (L. S.)

STATE OF NEW YORK, ss:

On the thirty first day of December, 1804, came before me Samuel Colt known to me, who on oath before me made did say that he saw Robert Troup execute the annexed deed that he this deponent subscribed his name as a witness to such execution thereof that he knew the said Robert Troup and that he is the same person described by [fol. 1192] that name in said deed. All which is to me satisfactory evidence of the facts so sworn to—there being therein no material erasures or Interlineations I allow it to be recorded.

Jacob W. Hallett, Master in Chancery.

On the twenty sixth day of January eighteen hundred and Eleven, before me Nathaniel W. Howell a commissioner appointed to perform certain duties of a Judge of the Supreme Court came John Creig one of the subscribing witnesses to the annexed deed to me personally known who being sworn deposed that he saw Israel Chapin described in said deed execute the same as the attorney of John Allis one of the grantors therein described and that he saw Thomas Morris in said deed described execute the same as the attorney of Joseph Annin, Horatio Jones, Nathaniel Norton & Birdsey Norton, Sturgin Sloan, William Adams, John Wilson, John Love, Samuel Hutchinson and Sarah his wife, Robert Norris, Isaac Malty and Oliver Phelps others of the grantors in said deed described, and that he was personally acquainted with the said Israel Chapin & Thomas Morris—I allow it to be recorded.

Nat W. Howell.

CLERK'S OFFICE,
Genesee County, ss:

Recorded this 1st day of February, 1811 at 8 o'clock P. M.
I. Babcock, Clk.

[fol. 1193] STATE OF NEW YORK,
Genesee County Clerk's Office, ss:

I, George MacDonald, Clerk of the County of Genesee, of the County Court of said County, and the Supreme Court, both being Courts of record, having a common seal, do hereby certify that I have compared the copy of the deed hereunto annexed with the original recorded in this office, in Liber 3 of deeds at page 48 and that the same is a correct transcript therefrom and of the whole of said original.

I further certify that the map attached is a photographic reproduction of a similar map drawn on the margin of said deed.

In witness whereof, I have hereunto set my hand and affixed the official seal of said County, at Batavia, this 7th day of December, 1923.
George MacDonald, Clerk. (Seal.)

[fol. 1194] DEFENDANTS' EXHIBIT —.

EXCERPTS FROM FINLEY FIELD NOTES

Lot No. 21, Cont'g 3 69/100 Acres

Begin'g at a post standing in the S. E. corner of said Lot Mark- No. 21 / No. 22 H.

Thence on the

Courses	Distances Chs.	Lks.	
			South Line
N. 61° 45 W.	5	20	over low marshy ground to a ridge of dry land in & N. W. & S. E. direction
	5	70	over said ridge to a marsh
	7	20	the marsh to upland
	9	73	thro' thick under brush of Oak & Hickory to a post mark- H No. 21 / No. 22. Thence

Courses	Distances Chs.	Lks.	
			on the West Line
N. 28° 15 E.	3	20	over upland timbered with White Oak & Hickory to a marsh
	4	40	across the marsh to the beach or sand bank
	5	08	to a post mark- H|No. 21 standing on the shore of Lake Ontario. Thence on the
			North Line
S. 47° E.	5	94	along the shore of said Lake
E. 30° 30 E.	4	20	along the shore of said Lake to a p-st mark- $\overline{\text{No. 21}}$|H. Thence on the
			East Line
S. 28′ 15.W.	1	64	to the place of beginning timbered with a few small Poplars.

Area $3\frac{69}{100}$ acres.

[fol. 1195] Section No. 1, Lot No. 21, Cont'g $\frac{2}{100}$ of an Acre

Begin'g at a Post Mark- H$\overline{\text{|S. N 21}}$ standing in the N. W. Corner of said section. Thence on the

East Line

S. 11° E. 1 04 along the shore of the Lake to a post mark- $\frac{\text{S. 1. No 21}}{\text{S. 2. No 21}}$| thence on the

South Line

N. 61. 45 W. 66 to a post mark- H$\left|\frac{\text{S. 1. No 21}}{\text{S. 2. No 21}}\right.$. Thence on

Courses	Distances Chs.	Lks.	
			the West Line
N. 28. 15 E.	84		to the place of beginning

Area, $\frac{2}{100}$ of an Acre.

[fol. 1196] Section No. 2, Lot No. 21, Cont'g $\frac{7}{100}$ of an Acre

Beginning at a Post Mark- H $\left|\frac{\text{S. 1 No 21}}{\text{S. 2 No 21}}\right.$ standing in the N. W. Corner of said section & on the East bounds of Water Street. Thence on the

			North Line
S. 61. 45 E.	66		to a post mark- $\frac{\text{S 1 No 21}}{\text{S 2 No 21}}$ on the shore of Genesee River. Thence on the
			East Line
S. 5° W.	93		to a post mark- $\frac{\text{S 2 No 21}}{\text{No 22}}$. Thence on the
			South Line
N. 61 45 W.	1	04	to a post on the east bounds of Water Street Mark- H $\left|\frac{\text{S. 2 No 21}}{\text{No. 22}}\right.$ Thence on the
			West Line
N. 28. 15 E.	84		to the place of beginning

Area $\frac{7}{100}$ of an Acre.

[fol. 1197] STATE OF NEW YORK,
County of Monroe, ss:

I, James L. Hotchkiss, Clerk of the County of Monroe and Clerk of the Supreme Court of said County, said Court being a Court of Record, having a common seal, do hereby certify, that I have compared the annexed copy of pages 106-107-108-109, said pages being

a part of Wm. Shepard's field notes, Greece, with the original notes in this office and that the same is a correct transcript therefrom.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Court at Rochester, N. Y., this 9th, day of November.

James L. Hotchkiss, Clerk. (Seal.)

[fol. 1198] DEFENDANTS' EXHIBIT 19-A

Whereas the Commonwealth of Massachusetts was formally the owner of certain lands situated in the State of New York, which were conveyed by said Commonwealth to Messrs. Phelps and Gorham. And whereas the said Phelps and Gorham afterwards by Indenture conveyed a portion of said lands again to said Commonwealth, whereupon said Commonwealth on the 12th day of March 1791 Entered into an agreement to sell the land so reconveyed to one Samuel Ogden then of Pennsylvania which said agreement was afterwards on the 11th of May next ensuing, assigned to one Robert Moris—and whereas the said Commonwealth did afterwards convey about 800,000 acres of land to said Moris pursuant to said agreement and whereas the said agreement, assignment thereof, and a copy of said deed to said Moris are on file in the Treasurer's Office—and said indenture is on file in the Office of the secretary of State. And whereas after the several transactions aforesaid, Moris conveyed said lands to a company, called The Holland Land company, who remain interested therein, and now have several suits pending in the courts of the United States, held within and for the northern District of New York, wherein the said several covanants are supposed to be very material Evidence, and to the End that they may be had for that purpose, and be thus used after having been proved and Entered of record, application has been made for them through the advice of John E. Spencer Esquire as council for said land company. Now therefore be it known to all whom it may concern, that believing the Ends of justice require that said application should be granted and that the Commonwealth can come to no harm by this temporary use of said papers, I hereby signify my assent that the same may be taken from the files, and delivered to any authorised agent of said company for the purpose aforesaid, on condition that a written promise signed by said agent and also by some responsible person resident in this commonwealth be given to the officers who deliver them, wherein the persons so signing shall become responsible for [fol. 1199] their return as soon as they have been used in the cases now pending and sooner if thereto required.

Worcester July 27th, 1834.

John Davis.

To Edward D. Bangs & Horatias Barnard, Esqrs., Boston.

N. B.—If the papers are not recorded copies will be made before the delivery and retained on file.

[fol. 1200] DEFENDANTS' EXHIBIT 26

(See p. 716 of Minutes)

Copy of Deed from Upton Co. to Ontario Beach Hotel & Amusement Co., Dated April 27, 1923, and Recorded in 1099 of Deeds at Page 395, in the Monroe County Clerk's Office

This indenture, made the 27th day of April, in the year One Thousand Nine Hundred and Twenty-Three, between the Upton Company, a corporation having its principal place of business in the City of Rochester, County of Monroe and State of New York, party of the first part, and Ontario Beach Hotel and Amusement Company, a corporation having its principal place of business in the City of Rochester, County of Monroe and State of New York, party of the second part,

Witnesseth: That the said party of the first part for and in consideration of one dollar ($1.00) lawful money of the United States, and other good and valuable consideration, paid by the said party of the second part, does hereby remise, release and forever Quit-Claim unto the said party of the second part, its successors and assigns forever, all the right, title and interest of the party of the first part in and to the following premises:

All that tract, piece or parcel of land, situate in the Twenty-Third Ward in the City of Rochester (formerly Town of Greece) County of Monroe, and State of New York, bounded on the west by Broadway or Lake Avenue, on the south by Beach Avenue on the east by the Genesee River and on the north by the shore of Lake Ontario.

Together with the appurtenances and all the estate and rights of the said party of the first part in and to said premises.

To have and to hold the above granted, bargained and described premises unto the said party of the second part, its successors and assigns forever.

[fol. 1201] The party of the first part also assigns, transfers, quit-claims and set over unto the party of the second part, all of the rights, title and interest of the party of the first part in and to any award for damages for the taking of said property, or any part thereof, by the City of Rochester in proceednge now pending in the Supreme Court of the State of New York for the condemnation of the said lands for the purpose of a public park, and all right, title and interest of the party of the first part in and to any claim for compensation for damages, interest or costs by reason of the taking of said lands by said City of Rochester for said purpose.

In witness whereof the said The Upton Company hath caused its corporate seal to be hereunto affixed, and this Instrument to be subscribed by its President the day and year first above written.

The Upton Company, by Wm. C. Fredericks, President.
(Seal of The Upton Company, Incorporated. 1905. Rochester, N. Y.)

[Canceled #1 documentary stamp.]

[fol. 1202] STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 27th day of April, in the year Nineteen Hundred and Twenty-Three before me personally came William C. Fredericks to me known who, being by me duly sworn depose and say that he resides in the City of Rochester, New York; that he is the President of The Upton Company, the corporation described in and which executed the above Instrument: that he knows the seal of said corporation; that the seal affixed to said Instrument is such corporate seal: that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

E. H. Vaughan, Notary Public.

[fol. 1202a] [Endorsed:] S. & D. Dfts'. Ex. 26. Deed, Quit-Claim. The Upton Company to Ontario Beach Hotel and Amusement Company. Dated April 27th, 1923. State of New York, County of Monroe, ss: Recorded on the 30th day of April, 1923, at 3:33 o'clock P. M., in Book No. 1099, of Deeds, at page 395, and examined. James L. Hotchkiss, Clerk. M. F. K. 1923, Apr. 30, P. M. 3:33.

[fol. 1203] DEFENDANTS' EXHIBIT 30

By His Excellency John Hancock, Esq., Governor of the Commonwealth of Massachusetts

(Commonwealth of Massachusetts Seal. John Hancock.)

I do certify all whom it may concern, that the Government of this Commonwealth have granted & Conveyed to the Honorable Nathaniel Gorham Esq. & to the Honorable Olive Phelps, Esqr., all their right and title which this Government hath or ought to have to the Lands lying West of Hudson's river in the State of New York and the said Nathaniel Gorham & Oliver Phelps Esqrs. are authorized to extinguish by purchase the claims of our good Friends and Brethern, the native Indians holding the fee or right of Soil in the territory aforesaid. And we have appointed our good Friend the Rev. W. Samuel Kirkland to superintend & approve the purchase that they shall make of the claims of such native Indians and that all such purchases as the said Nathaniel Gorham & Oliver Phelps Esqrs. shall make of the Claims of our said good friends of the Six Nations in presence of the said Superintendent shall be confirmed by the said Government of this Commonwealth.

[fol. 1204] In testimony whereof I have caused the Public Seal of the Commonwealth aforesaid to be hereto affixed this twenty third day of April Ao. Di. 1788, and in the Twelfth year of the Independence of the United States of America.

By his Excellency's Command.

John Avery, Jun., Secretary.

Massachusetts deed to Gorham & Phelps. Ontario ss: Recd. for record 20th day of June, 1816 at 9 o'clock A. M. And recorded in Lib. C of the miscellaneous records of said county at fol. 136 and examined. Hu. McNair, Clk.

[fol. 1205] DEFENDANT'S EXHIBIT No. 31

(See p. 827 of Minutes)

Indenture Between Commonwealth of Massachusetts and Messrs. Gorham and Phelps, Dated June 9, 1790

The Commonwealth of Massachusetts, Office of the Secretary

Boston, September 19, 1923.

I hereby certify that the following is a true copy of a copy of the "Indenture between the Comwth. and Messrs. Gorham and Phelps, June 9th, 1790.—", on file in the Archives Division of this office.

Witness the Great Seal of the Commonwealth.
Hubert H. Boynton, Deputy Secretary of the Commonwealth. (Seal of Massachusetts.)

[fol. 1206] Indenture Between the Comwth. and Messrs. Gorham and Phelps, June 9th, 1790

(Copy)

This indenture of two parts made and agreed upon this ninth day of June, Anno Domini, seventeen hundred and ninety by and between the Commonwealth of Massachusetts on the one part and the honorable Nathaniel Gorham Esqr. and Oliver Phelps Esqr. on the other part.

Whereas the said Gorham and Phelps in their memorial and representation to the Senate and House of Representatives of the said Commonwealth in General Court assembled, in their session begun and holden at Boston on the second Wednesday of January last, made respecting the proceedings of the said Gorham and Phelps in the management and sales of the western lands so called, purchased of the said Commonwealth in April seventeen hundred and eighty eight, did state several causes of the failure of the said Gorham and Phelps from performing their engagements then entered into with the said Commonwealth, and did also, in and by a certain writing under the hands of the said Gorham and Phelps, and bearing date on the fifteenth day of February last, among other things, and for the reasons therein set forth propose to the said General Court, to re-

convey to the said Commonwealth two thirds for quantity and quality of the whole lands, purchased as aforesaid lying to the eastward of the line of cession from this State to the United States, to be accepted in full satisfaction of certain two Bonds held by the said Commonwealth, against the said Gorham and Phelps, and that the same shall be ascertained by Commissioners, indifferently named for that purpose, provided always that the lands purchased by the said Gorham and Phelps of the Indians shall be included within the lands not reconveyed, and that the same shall be considered as in the natural state when purchased, and that if the same shall exceed one third of the said lands in value, then the said Gorham and Phelps shall pay for the surplus in porportion as they shall pay for the third part not reconveyed: And in consideration that the Government shall remit to the said Gorham and Phelps one year's interest on the Bond now in suit, they will exonerate the Commonwealth from all de- [fol. 1207] mands for the lands lost by the cession of this State to the United States. And whereas the said Gorham and Phelps, by a certain other writing under their hands and bearing date on the twenty sixth day of February last, did among other things, and beside renewing the said proposals of reconveyance, further propose to purchase of the Commonwealth, one undivided fourth part of said two thirds, to be reconveyed as aforesaid, upon the terms therein mentioned, and also to undertake at their own cost and charges to purchase and extinguish the Indian right in the whole of the said two thirds, and to make an actual survey of the same, in the manner and upon the terms in the said proposals mentioned; and also after such extinguishment shall be effected, to undertake to sell and dispose of the said remaining lands for the benefit of the Commonwealth, and without charge to them; and also by a certain other writing under their hands, and bearing date on the first day of March last, the said Gorham and Phelps did further propose not to take any measures for a division of the lands which shall be purchased of the Indians, but by mutual consent; and lastly that the State shall have a right at any time within one year, to accept of the said last mentioned proposals, or those made on the said fifteenth day of February last. And whereas the said General Court in their said session, and by their resolve passed on the fifth day of March last, did conclude, agree and establish as follows, that is to say, On the memorial of the honorable Nathaniel Gorham Esqr. and Oliver Phelps Esqr. and upon consideration as well of their proposals made on the fifteenth day of February last as of their proposals made on the twenty-sixth day of February last, together with other proposals in addition, this day made, respecting the western territory so called, bargained to them on the first day of April, Anno Domini seventeen hundred and eighty-eight: Resolved, that this Commonwealth do accept of said proposals dated on the twenty-sixth day of February last, as taken together with the two last clauses of the additional proposals made this day reserving to this Commonwealth according to the said additional proposals the right of accepting in preference at any time within one year from this date the said proposals, dated on the fifteenth day of February last. And the said Commonwealth

do accordingly agree with said Gorham and Phelps as to the two [fol. 1208] third parts of the said western territory; and as to their two Bonds not in suit, which were given therefor, and as to all other the provisos and conditions in the said accepted proposals recited. [Provided nevertheless, that if on division of the said lands, east of the said line of cession, it shall appear that the value of the said lands in which the said Gorham and Phelps have already extinguished the native right, shall exceed the one third part of the value of the whole of the said territory, then the said Gorham and Phelps shall pay to the said Commonwealth for the overplus] in the consolidated notes of this Commonwealth, at the same rate as they pay for said third part, or the value of such notes in Specie, estimating them at their present market price. Provided also, that so far only as the said Gorham and Phelps shall at their own costs and expence extinguish the native right in said two thirds of said lands, and lay the same out into townships within five years from the date of this Resolve, they shall be entitled to one undivided fourth part of the lands, in which they shall so extinguish the native right, and so lay out said lands on the terms aforesaid. And the grants, releases, bargains, covenants and agreements, and all other matters and things in the said proposals, and also the said reservation to this Commonwealth as aforesaid, offered and agreed to be made and hereby accepted, shall be more fully set forth, and carried into effect by legal and sufficient writings, and indentures to be executed and delivered as well on the part of the said Commonwealth, as on the part of the said Gorham and Phelps: And that the honorable James Sullivan Attorney General, and Samuel Sewell Esqr., with such as the honorable Senate shall join, shall be and hereby are appointed and authorized in the name and behalf of this Commonwealth to agree upon and establish all legal and sufficient writings and indentures, which shall be found necessary more fully to set forth and carry into effect, all and singular the premises according to the true intent and meaning of the said proposals hereby accepted, and of this Resolve, and to sign, seal, execute and deliver all and singular the writings and indentures which shall be necessary, on the part of this Commonwealth, receiving at the same time from the said Gorham and Phelps all and singular the writings and indentures on their part to be made, and which shall be deposited in the Secretary's [fol. 1209] Office. Resolved, that the expenses of dividing the said tract of land by Commissioners as aforesaid shall be paid, one moiety thereof by the Commonwealth, and the other moiety by the said Gorham and Phelps; and the honorable Nathan Dane Esqr. is joined.

Now this Indenture Witnesseth, that the said Gorham and Phelps, for and in consideration of the annulling and release by the said Commonwealth of two certain bonds hereinafter mentioned, and also in consideration of the other covenants and agreements in this indenture expressed, and on the part of the said Commonwealth to be performed, have granted released and confirmed; and do by these presents grant, release, and for themselves & their heirs, quitclaim and confirm, unto the said Commonwealth, their Grantees, and the

heirs and assigns of such grantees, all that right of pre-emption of the soil from the native Indians, and all other the estate, right title and property which the said Commonwealth had by virture of the Deed of cession and agreement executed in behalf of the said Commonwealth and of the State of New York, by their respective Commissioners at Hartford on the sixteenth day of December Anno Domini seventeen hundred and eighty six, or otherwise, and which the said Gorham and Phelps now have, or might have by virtue of the said Resolve of the first day of April, Anno Domini seventeen hundred and eighty eight, or by virtue of any other Resolve or Act of the said Commonwealth, or by virtue of any purchase from the said Native Indians, or from any other person or persons State or Corporation, and all other the claims and demands of the said Gorham and Phelps of in or to, two undivided third parts of the said territories and lands in the said Deed of cession described, and by the said State of New York ceded and confirmed to the said Commonwealth, reference thereto being had, and lying eastward of the said line of cession from the said Commonwealth to the United States, saving and reserving only to the said Gorham and Phelps their heirs and assigns, that in the division of the said territories and lands, the third part thereof retained, and which shall be assigned in severalty to the said Gorham and Phelps their heirs or assigns, shall be set off within that part of the said territories and lands which is already by them purchased of the said native Indians, and shall as far as possible comprehand their sales already actually made: [fol. 1210] and also that such purchase of the Indians, and the buildings and improvements which have been made and procured to the said third part retained as aforesaid, shall not be estimated in such division: To have and to hold the said right of pre-emption and all other the said estate, right, title and property which the said Gorham and Phelps have or might have, of in or to the said two undivided third parts of the said territories and lands, lying eastward of the said line of cession to the United States, with the privileges and appurtenaces thereof, saving only as aforesaid to the said Commonwealth and to the use thereof, and the Grantees of the said Commonwealth, and the heirs, and assigns of such Grantees forever: And the said Gorham and Phelps, hereby for themselves, their heirs, executors and administrators jointly and severally covenant and grant to and with the said Commonwealth, and the Grantees thereof, and the heirs and assigns of such Grantees that the said right of pre-emption, and all other the said release premises are free of any sale or incumbrance had or made by the said Gorham and Phelps or either of them, or any person or persons, State or Corporation, claiming from, by, or under them or either of them; and shall be warranted against the lawful claims of all persons, claiming from, by or under them, or either of them, but against no other person or persons. And the said Gorham and Phelps in consideration of the agreement hereinafter expressed on the part of the said Commonwealth, to be performed for allowing the amount of one year's interest of a certain other bond, held by them, against the said Gorham and Phelps, do

hereby for themselves, their heirs and assigns release, and forever acquit to the said Commonwealth all demands whatsoever which they the said Gorham and Phelps or their assigns have or might have for or by reason of any agreement of confirmation or warranty respecting that part of the said western territory which hath been claimed by the United States and wherefrom the said Gorham and Phelps have been evicted, and are still withheld, saving only that in case of the recovery of said evicted part by the said parties or either of them, upon the right of the said Commonwealth of Massachusetts, the same shall be divided, and shall enure and belong, as the other part of the said lands and territories, shall and do enure and belong by virtue hereof. And the (said) Gorham and Phelps for themselves [fol. 1211] their heirs and assigns hereby bargain and agree to and with the said Commonwealth, and the said Commonwealth hereby bargain and agree, to and with the said Gorham and Phelps, their heirs and assigns, that in case that part of the said lands and territories in which the said Gorham and Phelps have already extinguished the native right, and which is confirmed to them by an act or grant of the said Commonwealth passed on the twenty first day of November Anno Domini seventeen hundred and eighty eight, doth exceed an equal third part, according to the estimation aforesaid, of the whole of the said lands and territories lying eastward of the said line of cession to the United States, then the said Gorham and Phelps, their heirs or assigns shall and will purchase, and the said Commonwealth, or their assigns shall and will sell and convey to the said Gorham and Phelps, their heirs or assigns all such overplus or residue of land, more than such one third as aforesaid lying and being within the bounds in the said Act or grant last mentioned described, to hold as therein mentioned, the asid Gorham and Phelps their heirs or assigns paying therefor to the said Commonwealth or their assigns at the same rate and porportionably as the said Gorham and Phelps have agreed to pay for the one third part of the said territory retained by them as aforesaid, either in the consolidated notes of the said Commonwealth, or in gold or silver equivalent, estimating such notes at the present market price, such estimation to be considered however as respecting this bargain only. And the said Gorham and Phelps for themselves, their heirs, executors and administrators hereby covenant & agree to and with the said Commonwealth and their assigns to pay for the said overplus or residue of land, the whole amount of the same, at the rate aforesaid, and as soon as the same, if any, shall be ascertained, according to the estimation aforesaid, and by the partition of said territories and lands hereinafter agreed upon, that they the said Gorham and Phelps, their heirs or assigns shall and will make and execute to the said Commonwealth or their assigns a sufficient Bond as a collateral security for such payment to be made within two years next ensuing the said fifth day of March last. And the said Gorham and Phelps for themselves, their heirs and assigns do hereby bargain and agree to and with the said Commonwealth, and their assigns, and the said [fol. 1212] Commonwealth hereby bargain and agree to and with the said Gorham and Phelps their heirs and assigns, that they the said

Gorham and Phelps their heirs or assigns shall and will purchase, and the said Commonwealth or their assigns shall & will sell and convey to the said Gorham and Phelps all the right of pre-emption and all other the estate right and property which the said Commonwealth have or shall have, after the execution of this Indenture, of in or to two undivided fourth parts of the said released two third parts of the said lands and territories lying eastward of the line of cession, such two fourth parts to be estimated through the whole of the released two third parts, and to be allotted in the part thereof which is without the said tract of land described in the said Act or grant they the said Gorham and Phelps, their heirs or assigns, paying and satisfying the said Commonwealth or their assigns therefor, as follows, that is to say, for the one of the said two fourth parts paying the sum of sixteen thousand pounds of the lawful money of the said Commonwealth, on or before the expiration of five years next ensuing the said fifth day of March last, with lawful interest for the same to commence after the expiration of two years from that day. And for the other of the said two fourth parts, the said Gorham and Phelps or their heirs or assigns at their own cost and expense in all respects, purchasing and extinguishing as soon as it may be done with any reasonable advantage and within five years next ensuing the said fifth day of March last, the Indian or native right remaining to or in the whole of the said lands and territories lying eastward of the said line of cession; and also making or causing to be made an actual survey of the whole of the said remaining lands and territories, or of each and every parcel thereof, which shall be at any time purchased of the said Indians until the whole shall be so surveyed, and also allotting and describing the same in townships of six miles square, and depositing within one year after each and every such purchase of any parcel of the said remaining lands and territories as aforesaid, a true and attested plan thereof, accompanied with proper field notes; such purchases to be made with the aid of a Superintendant to be appointed by the said Commonwealth, if such appointment shall be judged necessary. And the said Gorham and [fol. 1213] Phelps on their part, and for themselves, their heirs, executors, administrators and assigns, hereby convenant, grant and agree to and with the said Commonwealth and their assigns, that they the said Gorham and Phelps their heirs or assigns shall and will pay, or cause to be paid to the said Commonwealth or their assigns the said sum of sixteen thousand pounds with the interest thereof in manner as aforesaid, & for a collateral security of such payment will make and execute a sufficient Bond jointly and severally to the said Commonwealth to be conditioned for the payment of that sum as aforesaid. And further the said Gorham and Phelps, for themselves, their heirs and assigns do hereby covenant, grant and agree, to and with the said Commonwealth, and their assigns, that they the said Gorham and Phelps their heirs or assigns shall and will as soon as it may be done with any reasonable advantage, and at their own cost and expense, purchase and extinguish the Indian or native right, to and in the whole of the said remaining lands and territories, lying eastward of the said line of cession to the United

States, and shall and will make, or cause to be made, in manner as aforesaid an actual survey and plan in townships of six miles square, of each and every parcel of the said remaining lands and territories which shall be so purchased from the Indians as aforesaid, and within one year next after such purchase, will cause such plan thereof to be deposited in the Secretary's office as aforesaid.

And the said Commonwealth of Massachusetts on their part, for themselves and their assigns hereby covenant, grant and agree to and with the said Gorham and Phelps, and their heirs and assigns, that the said Commonwealth or their assigns on payment within two years as aforesaid of the whole amount, at the rate aforesaid of the said overplus or residue of lands, if any shall be found within the bounds of the said tract of land, described in the said act or grant, shall and will grant, convey and confirm to the said Gorham and Phelps their heirs or assigns all the said overplus and residue as aforesaid and on payment of the said sum of sixteen thousand pounds with the interest thereof, in manner as aforesaid, shall and will grant, convey and confirm to them the said Gorham and Phelps, or their heirs or assigns, all the said one fourth part of the whole of the said [fol. 1214] released two third parts, to be estimated and allotted as aforesaid: And in case of any payment by them, or either of them, in part of the said amount of the said overplus, which shall be made within the said term of two years, or in part of the said sum of sixteen thousand pounds, which shall be made within the said term of five years, the said Commonwealth shall and will thereupon, and in consideration of such payment respectively and in part execution of their foregoing covenants respectively grant convey and confirm to the said Gorham and Phelps or their heirs or assigns, such part of the said overplus or residue of land, or such part of the said one fourth part as shall be proportionable to such payment, and according to the intention and application thereof respectively, the said Commonwealth to have the election in the applying of such payment if the said Gorham and Phelps their heirs or assigns shall fail to declare the intention thereof. And upon the purchasing and extinguishing the Indian right as aforesaid, to and in the said remaining lands, or any parcel thereof as aforesaid, and the surveying the same and depositing a plan thereof as aforesaid, the said Commonwealth or their assigns, shall and will grant, convey and confirm unto the said Gorham and Phelps their heirs or assigns one undivided fourth part of each and every such parcel of land which shall be so purchased as aforesaid: And the whole of the said Indian or native right to and in the said remaining lands and territories being so purchased and extinguished as aforesaid within the said term of five years, the said Commonwealth or their assigns shall and will grant, convey and confirm to them the said Gorham and Phelps or their heirs or assigns the whole of the said one fourth part including former grants if any shall have been made, of and in the said released two third parts of said lands and territories, to be estimated through the whole of the said two thirds, and to be allotted as aforesaid which shall be in full satisfaction to them for their expenditures

and services in making such purchase and survey. Provided always, and it is mutually understood and agreed by and between the said parties to these presents, that no Division or partition of any parcel of land, of which the said Gorham and Phelps their heirs or assigns shall hereafter become owners in Common with the said Common- [fol. 1215] wealth, or with their assigns, by any grant or confirmation made in performance of the foregoing covenants, shall be claimed or had unless by mutual consent, until the full payment or performance of the said sums of money and services by the said Gorham and Phelps or their heirs or assigns, to be paid and performed. [Provided also and reserving to the said Commonwealth and their assigns, and it is further mutually understood and agreed by and between the said parties to this Indenture, that the said Commonwealth or their assigns, shall and may at any time within one year next ensuing the said fifth day of March last assume and hold giving notice thereof to the said Gorham and Phelps or either of them, or to their heirs or assigns all and singular the said right of preemption, and all other the estate and property which the said Commonwealth or their assigns have or shall have by virtue hereof, or otherwise, to or in the said released two third parts of the said lands and territories subject only to the claim of the said Gorham and Phelps, or their heirs or assigns, to the said overplus or residue of lands, if any shall be found as aforesaid, the bargains and agreements herein before made respecting the two fourth parts of the said two thirds notwithstanding and fully acquitted thereof] and according to the said proposals of the said Gorham and Phelps, made on the said fifteenth day of February last; and the said Gorham and Phelps, their heirs and assigns shall thereupon be likewise acquitted as to their part of the same bargains and agreements, and shall be hereby fully discharged therefrom, and from any bonds which they shall make as collateral security for the same. And it is hereby further mutually covenanted, agreed and concluded by and between the said parties to this Indenture, each for themselves and their respective assigns that the estimation and partition first to be had between them, whereby to set off and assign to the said Commonwealth or their assigns, the said released two third parts of the said lands and territories, and to the said Gorham and Phelps their heirs or assigns their one third part thereof retained by them as aforesaid; to hold to the said parties respectively in severalty, shall be had and made by three Commissioners, impartial men to be indifferently named, appointed, agreed upon, and authorized by the said parties, and such appointment and authority shall be made and given within one year from the date hereof, and such [fol 1216] partition shall be executed, as soon as may be after such appointment and according to the true intent of the said release, and the reservations therein made as herein before is recited and agreed, and in the estimate of the said lands and territories for the purpose of such partition, the same shall be considered as in their original state, before the purchases and improvements made thereupon by the said Gorham and Phelps or their assigns; and all and singular the expenses of such division, shall be paid the one moiety

thereof by the said Commonwealth, or their assigns, and the other moiety thereof by the said Gorham and Phelps, their heirs or assigns. Provided, and it is further mutually covenanted, granted, and agreed by and between the said parties respectively, each to and with the other, that in failure of the appointment by mutual agreement of Commissioners as aforesaid within the term aforesaid or afterwards upon the request of either party to the other, then and in that case the Justices of the Supreme Judicial Court of the United States, shall and may upon the application of either of the said parties nominate and appoint such Commissioners who shall be thereupon fully authorized to make and establish such partition as aforesaid, according to the true intent of this writing, and the claims and estates respectively of the said parties to and in the premises, and such partition being made, and declared by such Commissioners by writing under their hands and seals, the same shall be valid and effectual to all intents and purposes & the said parties respectively shall thereupon hold in severalty and not otherwise the several parts, parcels and descriptions of lands estates and rights which shall be respectively set off assigned and determined to each of them by such Commissioners as aforesaid. And the said Commonwealth of Massachusetts in consideration of the grants, releases and agreements herein by the said Gorham and Phelps made and to be performed, hereby release and acquit to them and each of them, and to all concerned, all debts and demand whatsoever which the said Commonwealth have or might have, by force and virtue of two certain bonds made by the said Gorham and Phelps, with others their sureties, dated on the 20th day of October A. D. 1788—the one of the said bonds being conditioned for the payment of the sum of one hundred thousand pounds—with interest on or before the expiration [fol. 1217] of two years from the first day of April A. D. 1788, and the other of the said bonds being conditioned for the payment of the sum of one hundred thousand pounds, on or before the expiration of three years from said 1st day of April, which two bonds are to be delivered up to the said Gorham and Phelps to be cancelled; also the said Commonwealth for the consideration aforesaid and more especially in consideration of the said release by the said Gorham and Phelps, of all demands which they might have against the said Commonwealth respecting that part of the said western territory which hath been claimed by the United States, do hereby covenant and agree to and with the said Gorham and Phelps, their heirs, executors and administrators, that the said Commonwealth shall and will allow and acquit to the said Gorham and Phelps, their heirs executors or administrators, a sum of money equal to one year's interest of the bond of the said Gorham and Phelps, retained by the said Commonwealth and which is now in suit, such sum to be allowed upon such bond within one month after the determination of such suit, or afterwards upon demand as received in part satisfaction thereof, or of any judgment which shall be rendered in such suit thereupon.

In witness whereof, in the name and behalf of the said Commonwealth, by virtue of the appointment and authorities in the said

recited Resolve, made on the said fifth day of March last, by the said Senate and House of Representatives in General Court assembled, expressed and in pursuance of those Resolves to the part of this Indenture, remaining with the said Gorham and Phelps, the said James Sullivan, Nathan Dane and Samuel Sewall, have set their hands and seals; and to the part of this Indenture, remaining with the said Commonwealth the said Gorham and Phelps have set their hands and seals the day and year first above written. And it is further agreed and the said Commonwealth doth grant and covenant to and with the said Gorham and Phelps, their heirs and assigns, that whenever the said Gorham and Phelps shall secure to the said Commonwealth the full payment to them of the value and amount of the said overplus of one third part within the said tract of land, which hath been confirmed as aforesaid to the said Gorham and Phelps, such security to be accepted by the Legislature of the said Commonwealth for the time being; and an acknowledgment thereof [fol. 1218] to be endorsed hereon, that then, and in that case the whole of the said overplus shall be the clear right and estate of the said Gorham and Phelps, their heirs and assigns forever.

Nathl. Gorham (L. S.), Oliver Phelps (L. S.)

Signed, sealed and delivered in presence of us, David Cobb, Richd. Soderstrom, Jno. Livingston

Secretary's Office, July 30, 1834

The foregoing compared with the original, and found to be a true copy—and said original delivered to John Lowber Esqr. of Batavia by the Governor's Orders—which see on file.

Edward D. Bangs, Secretary of the Commonwealth.

[fol. 1219] DEFENDANTS' EXHIBIT 31-A

Commonwealth of Massachusetts

In the House of Representatives, March 5, 1791

Resolved that the Hon. David Cobb, Esq., William Eustis & Thomas Davis, Esqrs. with such as the Honourable the Senate shall join, be a Committee with full power and authority to bargain and sell to Samuel Ogden and his heirs and assigns all and sin-
A. gular the right (A) of preemption and all other the title and interest which this Commonwealth hath in and to a certain tract or parcel of land situate in the State of New York, being part of the land ceded by the State of New York to this Commonwealth which tract or parcel of land is bounded westerly on Lake Erie and on land late belonging to the United States, and by them conveyed to the State of Pennsylvania, Southerly by the State of Pennsylvania, Easterly on land the property of Nathaniel Gorham and

Oliver Phelps, Esq., and their assigns, and Northerly on Lake Ontario, reserving therefrom one undivided sixtieth part thereof
B. (B) for the consideration of one hundred thousand pounds to be paid in the following manner, viz: Seven thousand five hundred pounds in three months from the signing the deed. Seven thousand five hundred pounds in six months—and fifteen thousand pounds annually until the whole is paid, with interest at Six P Centum P annum after Six months, from the date of the conveyance upon each and every of the said installments, reserving however to the said Samuel Ogden his heirs, executors, administrators and assigns, a right to make payment of the said installments at any earlier period than that in which they may become due as aforesaid. And upon such bargained rate the said Committee are hereby fully authorized to execute in the name and behalf of this Commonwealth just, good and sufficient deed as shall be necessary to complete the same, and thereby to oblige this Commonwealth by any other act [fol. 1220] or acts lawful in the premises to confer to the Samuel Ogden, his heirs and assigns all and singular the right, title and interest aforesaid upon the said and just extinguishment of the Indian claims. Claims which may remain to the said lands and also to engage on behalf of this Commonwealth that on request of the legislature thereof some suitable person shall be appointed to superintend at the expense of the said Samuel Ogden his heirs or assigns at any Indian Treaty which shall or may be held for the purpose of such extinguishment agreeably to the deed of cession aforesaid, and as therein is required. And the said Committee are hereby enjoined to take such security either real, personal or both for the payment and performance of the considerations terms aforesaid, as they together with the Attorney General shall judge adequate and sufficient.

And it is Resolved that all monies to be paid as aforesaid shall be paid to and received by the treasurer of this Commonwealth and duplicate shall be given therefor and one such receipt for every payment and also the counterpart, of any deeds which shall be executed as aforesaid, and any other deeds or securities respecting such sale shall be deposited with the Secretary of this Commonwealth. And of their proceedings herein the said Committee shall make report to the attorney General as soon as may be.

Sent up for concurrence.

David Cobb, Spk.

In Senate March 5th, 1791. Read and Concurred & Samuel Phillips & Nathaniel Wells, Esquires, are joined.

Saml. Phillips, Presidt.

In Senate March 8, 1791. Read again and reconsidered, so far as that the Senate propose an amendment at it.

Sent down for concurrence.

Saml. Phillips, Presid't.

[fol. 1221] In the House of Representatives March 8, 1791. Read and concurred.

David Cobb, Spk.

Approved. John Hancock.

Amendment

At A del. from A to B & insert: of the Commonwealth in & Unto all that tract of land lying in the State of New York, the right of pre-emption thereof the State of New York hath ceded, granted, released & Confirmed to this Commonwealth their grantees and the heirs and assigns of such grantees forever, saving and excepting such part or parts of said Tract the right of pre-emption whereof this Commonwealth has ceded and granted to the United States of America and also saving and excepting such part or parts of the same Tract the pre-emption right to which now belongs to Nathaniel Gorham & Oliver Phelps Esqrs, their heirs and assigns by virtue of any grant or confirmation from this Commonwealth, however the same Tract is or may be bounded or described & Also reserving one undivided sixtieth part of tract / excepting such parts thereof as belong to the said United States and said Gorham & Phelps by virtue of any cession from this Commonwealth.

[fol. 1222] DEFENDANTS' EXHIBIT 32

(See p. 829 of Minutes)

Document Conveying 500,000 Acres Lying Just West of the Phelps & Gorham Actual Purchase to Robert Morris

Whereas the General Court of the Commonwealth of Massachusetts by their Resolve of the eighth day of March in the year of Our Lord One thousand seven hundred and ninety-one, did appoint Samuel Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis Esquires, a Committee with full powers & authority to bargain sell & convey to Samuel Ogden Esquire his heirs & assigns, all & singular the right of preemption & all other the title & interest of the said Commonwealth in & into all that tract of Land lying in the State of New York, the right of Preemption whereof, the State of New York ceded granted released & confirmed to the Commonwealth of Massachusetts, their Grantees & the heirs & assigns of such Grantees forever, saving & excepting such part or parts of said Tract, the right of preemption whereof the said Commonwealth has ceded & granted to the United States of America, & also saving & excepting such part or parts of the same Tract, the preemptive right to which now belongs to Nathaniel Gorham & Oliver Phelps Esquires their heirs or assigns, by Virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described, & also reserving one undivided sixtieth part

of said Tract, excepting such parts thereof as belong to the said United States & said Gorham & Phelps, by Virtue of any Cession from the Commonwealth aforesaid And whereas the above named Committee pursuant to the resolve aforesaid did by their Deed of Indenture bearing date the twelfth day of March last, in Consideration of the Covenants in the same Indenture mentioned, Covenant & agree with the said Ogden, that they would sell & convey to him his heirs & assigns, the preemptive & all other right & title which the said [fol. 1223] Commonwealth, empowered the said Committee to convey by the Resolve aforesaid. And the said Samuel Ogden having by his Deed, bearing even date with these presents relinquished his right to & released his interest in the same Covenants so far as they relate to a conveyance of the same right to the said Territory to him & having agreed that the right aforesaid shall be conveyed to Robert Morris Esquire to whom he has assigned the Covenants aforesaid & that such Conveyance to the said Morris shall in effect be considered as a compliance with the covenants aforesaid for a Conveyance to him the said Ogden now know all men by these presents that We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis by Virtue of the authority aforesaid & in consideration of all the premises herein before recited, & also in consideration of the Sum of forty-five thousand pounds paid by Robert Morris of the City & County of Philadelphia & State of Pennsylvania Esqr., or secured to be paid for & to the Use of the Commonwealth aforesaid, have for & by authority of the same Commonwealth, given granted bargained & sold & conveyed by these presents for & in behalf of the said Commonwealth do give grant bargain sell & convey to the said Robert Morris his heirs & assigns forever, the preemptive right & all other right title & interest which the said Commonwealth hath to a certain tract or parcel of land being part of the Territory above described, which parcel contains about Five hundred thousand Acres more or less & is bounded as follows to wit. Westerly by a Meridian line drawn from a point on the North Line of the State of Pennsylvania twelve miles west of the South west corner of the Land confirmed to Nathaniel Gorham & Oliver Phelps to the Line in Lake Ontario which divides the Dominion of the King of Great Britain & the United States, North-[fol. 1224] erly by said dividing line easterly by the Land confirmed to Nathaniel Gorham & Oliver Phelps by the Legislature of the Commonwealth of Massachusetts by An Act passed November the twenty-first One thousand seven hundred & eighty-eight & Southerly by the said North line of the State of Pennsylvania, reserving out of the same granted premises one undivided sixtieth part thereof. To have & to hold to the said Robert Morris his heirs & Assigns forever, all the preemptive right, & all other right title & interest which the said Commonwealth hath in & to the said granted premises saving the reservation aforesaid, & the said Commonwealth doth hereby covenant & agree to & with the said Robert Morris his heirs & Assigns, that he & they shall hold & enjoy the same free from all claims & demands of all & every person claiming for or by any Right of the said Commonwealth in witness whereof the said Samuel

Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis have hereunto set their hands & Seals by Virtue & force of the Authority of the said Commonwealth the Eleventh day of May, in the Year of Our Lord One thousand seven hundred & Ninety-one.

Saml. Phillips (L. S.), Nathl. Wells (L. S.), David Cobb (L. S.), William Eustis (L. S.), Thomas Davis (L. S.)

Signed sealed & delivered in presence of Saml. Ogden, David Morey, Thomas Walleut.

COMMONWEALTH OF MASSACHUSETTS:

I approve of this Conveyance and the security given for it as adequate & sufficient.

Ja. Sullivan, Attorney General Commonwealth of Massachusetts.

May 16th, 1721.

SUFFOLK, ss:

Then the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, and Thomas Davis appeared and acknowledged this to be their Act and Deed before me.

Ja. Sullivan, Jus. Peace Throughout said Commonwealth.

[fol. 1225] The preceding instrument was recorded at the request of Robert Morris therein named and is a true Copy of the Original Examined and Compared with the Original this 17th Aug., 1791, by me

Lewis A. Scott, Secretary.

STATE OF NEW YORK, ss:

Office of the Secretary of State

I have compared the preceding copy of instrument with the record thereof in this office, in Book Number 23 of deeds at page 231 and I do hereby certify the same to be a correct transcript therefrom, and at the whole thereof.

Witness my hand and the seal of office of the Secretary of State, at the city of Albany, the ninth day of December one thousand nine hundred and twenty.

C. W. Taft, Second Deputy Secretary of State. (Seal of Secretary of State, State of New York.)

Defendants' Exhibit 33.

[fol. 1226] Commonwealth of Massachusetts

In Senate June 19th, 1792

Whereas this General Court of the Commonwealth of Massachusetts upon the first day of April in the year of our Lord one *hundred* seven hundred and eighty-eight by a certain Resolve of that date, did agree to grant, sell, and convey to Nathaniel Gorham and Oliver Phelps, Esquires, all the right, title, and demand which the said Commonwealth had in and to the western territory ceded by the state of New York to the Commonwealth by a deed executed by the Commissioners of the said State on the 16th day of December, 1786, with such exceptions and limitations as are expressed as well in acts and proceedings of the said General Court as is those of their agents and committees; and whereas by a certain indenture of agreement made between the said Commonwealth and the said Gorham and Phelps on the 9th day of June, in the year of our Lord, One Thousand Seven Hundred and Ninety, the said Gorham and Phelps reconveyed to the said Commonwealth a certain part of the said territory according to the conditions of the same indenture, reference to the same being had, and whereas the said Commonwealth by Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis, Esquires, agents for that purpose, especially appointed on the 11th day of May, in the year of our Lord, One Thousand Seven Hundred and Ninety-one, did sell and convey to Robert Morris, Esquire, all and singular the right and title which the said Commonwealth had to the same part of said territory so reconveyed by the said Gorham and Phelps to the said Commonwealth according to the tenor of the deed for that purpose executed reference to the same being had but reserving amongst other things one undivided sixtieth part of the same tract so recon-
[fol. 1227] veyed by the said Gorham and Phelps as aforesaid, which same one-sixtieth part was so reserved because the said Gorham and Phelps had previously contracted to convey the same to John Bulter and it being represented to this court that Robert Morris of Philadelphia, in the State of Pennsylvania, Esquire, has purchased the said sixtieth part of the assigns of the said John Butler, and he having petitioned the General Court of the said Commonwealth for a release of the same from the reservation aforesaid.

It is therefore resolved that the said Commonwealth will, and hereby doth release and convey to the said Robert Morris, his heirs and assigns forever all the right, title, and interest which the said Commonwealth hath or could have, by virtue of the same conveyance of the said Gorham and Phelps or by virtue & force of the said reservation to the said one-undivided sixtieth part of the said tract reserved as aforesaid, so that he, the said Robert Morris, his heirs and assigns, shall hold and enjoy the same in the same manner and to all purposes as the said Commonwealth could hold the same by virtue of the same reservation; but the said Commonwealth doth

the said State of New York had ceded to this Commonwealth, and which had not been by them before otherwise ceded or granted; reserving one sixtieth part thereof; ask leave to report,—That on the twelfth of March last, they made a Covenant of Indenture with the said Ogden, that they would execute to him or his heirs and not warrant the same against any claim which may arise by means of any conveyance from the said Gorham and Phelps or either of them or from any person claiming under them or under either of them. Sent down for concurrence.

Samuel Phillips, Presdt.

In the House of Representatives, June 20, 1792. Read and Concurred.

David Cobb, Spk.

The foregoing approved. John Hancock.

[fol. 1228] DEFENDANTS' EXHIBIT 34

Report of Committee Relative to Sale of Western Land to S. Ogden

The committee appointed by the General Court on the eighth day of March last, with authority to sell and convey to Samuel Ogden esqr. his heirs & assigns, the right of preemption, and other the title and interest of the Commonwealth to that part of the lands lying in the State of New York, the right of preemption whereof assigns a good deed of the pre emptive and other right of the Commonwealth to the land, which by the Resolve abovementioned they were authorized thus to convey; on condition that the said Ogden should within sixty days, make to the Commonwealth, such security as on the said Indenture is described, for the payment of the several sums expressed in the aforesaid resolve, at the respective periods therein specified,—and on the performance of the aforesaid conditions, the Committee further covenanted in behalf of the Commonwealth, for the appointment of a Superintendant of any purchases of the native Indians, (the said Ogden paying the said Superintendant) conformably to the authority & directions given by the resolve aforesaid;—the particulars of this covenant will appear by the copy No. 1, herewith presented.

On the eleventh day of May last the said Ogden met your Committee in Boston, and assigned over the Covenant aforesaid to Robert [fol. 1229] Morris esqr. of the City of Philadelphia, as per copy No. 2, whereupon, the said Morris secured to the Commonwealth the payment of one hundred forty-five thousand silver dollars in the manner following viz. The said Morris drew on Thomas Russell esqr. of Boston, three orders in favor of Jeremiah Wadsworth esquire of Hartford in Connecticut, of the following tenor, viz: One order for twenty thousand dollars, payable on 11th August next;—another order for twenty-five thousand dollars, payable on 11th November

next;—the third order for fifty thousand dollars payable on the eleventh May next, with lawful interest thereon from 11th November next; all which orders are endorsed by said Wadsworth, and accepted to pay by said Rusell; The said Morris at the same time, drew one other order upon Jeremiah Wadsworth esquire in favor of Thomas Russell esquire for fifty thousand dollars, payable on 11th May, 1793, with lawful interest from 11th November next, which order was endorsed by said Russell and accepted to pay by said Wadsworth.

The beforementioned orders, with five thousand dollars, paid by the said Ogden at the time of making the aforesaid Covenant, make the amount of one hundred and fifty thousand dollars, equal to forty-five thousand pounds; in consideration of which the Committee conveyed by deed, the pre-emptive, and other right of the Commonwealth to a tract of the aforesaid lands, adjoining to the land confirmed to Messrs. Gorham and Phelps estimated at above five hundred thousand acres.

The Committee having taken security, thus ample, for the foregoing sum; and having conveyed the Commonwealth's right aforesaid, to only about one eighth part of the tract in question, they made to the said Morris four deeds of the remainder of the said tract, [fol. 1230] and took real security in the following manner;—They made a deed of the aforesaid right, to about eight hundred thousand acres, beginning on the north line of the State of Pennsylvania, twelve miles from the southwest corner of the lands confirmed to Messrs. Gorham and Phelps, and extending sixteen miles on the line aforesaid; as per copy No. 3.

The tract described in the second of the said deeds, begins on the aforesaid north line of Pennsylvania, twenty eight miles from the southwest corner of land confirmed to Messrs. Gorham and Phelps; and extends sixteen miles on the same line; as per copy No. 4.

The tract described in the third of the said deeds, begins on the line aforesaid, forty four miles from the point of beginning; described in the foregoing deeds, and extends sixteen miles on the same line, as per copy No. 5.

The tract described in the fourth of the said deeds, begins on the line aforesaid, at the distance of sixty miles from the aforesaid point of beginning, and comprehends all the lands remaining in the tract in question,—as per copy No. 6.

The four deeds last mentioned, are delivered, as escrowes, into the hands of Nathaniel Appleton, John Lowell and Oliver Wendell esquires (who were agreed on by the said Morris and your Committee, for this purpose) to be delivered to the said Morris, his heirs or certain Attorney, upon his or their discharging certain bonds, signed by Robert Morris & Samuel Ogden, payable to the Treasurer of the Commonwealth, with interest from the eleventh of November next, of the description, and in the manner hereafter mentioned viz—

The first of the four last mentioned deeds is to be delivered, upon the discharge of one of the aforesaid bonds, conditioned for the pay-[fol. 1231] ment of fifteen thousand pounds, on or before the 11th May 1794.

The second of the said deeds is to be delivered, upon the discharge of another of the said bonds, conditioned for the pay of fifteen thousand pounds, on or before the 11th May 1795.

The third of the said deeds is to be delivered upon the discharge of another of the said bonds conditioned for the payment of fifteen thousand pounds on or before the 11th May 1796.

The fourth of the said deeds is to be delivered upon the discharge of a bond, conditioned for the payment of ten thousand pounds on the 11th May 1797.

The conditions of the delivery of each deed are particularly expressed on the same, and signed by the said Morris & your Committee. Messrs. Appleton, Lowell & Wendell have given a copy of the several deeds beforementioned, and of the endorsements of the terms on which they are severally to be delivered, with their receipt on each copy, asknowledging the purpose for which the originals are deposited with them; & the conditions, on which each deed is to be delivered.

All the bonds and bills beforementioned, with the Indenture aforesaid, are lodged with the Treasurer,—his receipts are taken for them, and those receipts are lodged with the Secretary of the Commonwealth.

The beforementioned copies of the deeds, with Messrs. Appleton, Lowell and Wendell's receipt for the originals of those deeds, and their acknowledgment of the purpose for which they received them, with Mr. Ogden's release of the aforesaid Covenant of Indenture, which are herewith presented will be disposed of as the honble Legis- [fol. 1232] lature shall direct. The foregoing is very respectfully submitted by

Samuel Phillips, Nath. Wells, David Cobb, William Eustis, Thos. Davis, Committee.

For the other Papers referred to in the foregoing report see the Book of Treaties from Page 111 to 132.

[fol. 1233] This indenture of two parts made and concluded upon the twelfth day of March in the year of Our Lord One thousand seven hundred and ninety one, by Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis esquires for & in behalf of the Commonwealth of Massachusetts on the one part and Samuel Ogden of Delaware works in the State of Pennsylvania esqr. on the other part witnesseth.

That whereas the General Court of the said Commonwealth of Massachusetts, upon the eighth day of March instant by their Resolve of that date, did appoint the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis esquires a Committee with full power and authority to bargain and sell to the said Samuel Ogden esqr. his heirs and assigns all & singular the right of preemption, and all other the title and interest of the same Commonwealth of Massachusetts in & unto all that tract of land lying in the State of New York the right of pre-emption whereof the State of New York ceded, granted, released and confirmed to the said

Commonwealth of Massachusetts and their grantees, and to the heirs and assigns of such grantees forever, saving and excepting such part or parts of the same tract the right of pre-emption whereof this Commonwealth has ceded and granted to the United States of America; & also saving & excepting such part or parts of the same tract, the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps esquires, their heirs and assigns by virtue of any grant & confirmation from the said Commonwealth of Massachusetts, however the same is or may be bounded or described; also reserving one undivided sixtieth part of the said tract, excepting such parts thereof as now belong to the United States and said Gorham and [fol. 1234] Phelps by virtue of any cession & Confirmation from the said Commonwealth of Massachusetts for the consideration of one hundred thousand pounds lawful money of said Commonwealth of Massachusetts, to be paid in the following manner, to wit—Seven thousand five hundred pounds thereof to be paid within three months from the time a deed shall be made and executed by the said Committee to the said Samuel Ogden of the pre-emptive right and all other right which the Commonwealth of Massachusetts aforesaid hath to the premises—Seven thousand five hundred pounds within six months from the time of making & executing such Deeds—And fifteen thousand pounds annually from the time aforesaid, until the said sum of one hundred thousand pounds lawful silver money of said Commonwealth of Massachusetts, shall be paid, with interest upon the same sums aforesaid, which shall not be paid within six months from the time of making such deed, that is to say, upon the whole sum of one hundred thousand pounds from and after the expiration of the six months aforesaid until the whole shall be paid, at the rate of six per centum per annum

In pursuance and by virtue of which authority aforesaid the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis on the part and behalf of the said Commonwealth of Massachusetts do covenant & agree to and with the said Samuel Ogden in consideration of his covenants and agreements herein mentioned and expressed, and in consideration of his having paid into the Treasury of the said Commonwealth of Massachusetts the sum of fifteen hundred pounds lawful money of the same, which is to be considered as a part payment of the sum of seven thousand five hundred pounds first above mentioned, that we the said Samuel Phillips, Nathaniel [fol. 1235] Wells, David Cobb, William Eustis and Thomas Davis will make & execute to him the said Samuel Ogden, his heirs and assigns, a good and valid deed of the pre-emptive, and all other right and title which the said Commonwealth of Massachusetts hath to the premises which are bounded and described as follows—to wit—All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie; and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east from the northern termination of said streight or waters, and

which premises to be conveyed, are to extend on the line of said tract belonging to the state of New York to the south shore of Lake Ontario, then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending until a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth of Massachusetts by an Act of the Legislature thereof passed the twenty first day of November, Seventeen hundred and eighty eight. And the said premises to be bargained & sold as aforesaid by virtue of the powers, contained in Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so upon that line westwardly to the place of beginning where that line meets the tract lately ceded by the said United States to the said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof, which [fol. 1236] same deed we the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis for and in behalf of the same Commonwealth do covenant and agree to make and execute to the said Samuel Ogden in manner aforesaid at any time within sixty days from the date of these presents, upon his procuring to be executed and delivered to us six bonds, signed, sealed and delivered before two or more subscribing witnesses, to the said Commonwealth of Massachusetts by himself, and Robert Morris of the City of Philadelphia in the State of Pennsylvania esqr. and Jeremiah Wadsworth of Hartford in the County of Hartford and State of Connecticut esqr. one of which shall be for the sum of Twelve thousand pounds, conditioned for the payment of six thousand pounds lawful money of the said Commonwealth of Massachusetts upon or before the eleventh day of August next, with interest from that time till paid,—One other for the sum of Fifteen thousand pounds, conditioned for the payment of seven thousand five hundred pounds to the said Commonwealth of Massachusetts, upon or before the eleventh day of November next with interest as aforesaid at the rate aforementioned from the said eleventh day of November until the same shall be paid—One other bond for thirty thousand pounds conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May in the year of our Lord, One thousand seven hundred & ninety two, with interest from and after the eleventh day of November aforesaid—And one other bond for thirty thousand pounds, conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May which will be in the year of our Lord One thousand seven hundred and ninety three, with interest from the said eleventh day of November, until paid—And one other bond for thirty thousand pounds conditioned for the pay- [fol. 1237] ment of fifteen thousand pounds to the said Commonwealth of Massachusetts upon or before the eleventh day of May, in the year of our Lord One thousand seven hundred and ninety four, with interest, at the rate abovementioned, from and after the eleventh day of November aforesaid, until paid—And one other bond

of thirty thousand pounds conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May, which will be in the year of our Lord, One thousand seven hundred and ninety-five, with interest for the same from and after the eleventh day of November aforesaid at the rate aforesaid.—And one other Bond for thirty thousand pounds conditioned for the payment of fifteen thousand pounds upon or before the eleventh day of May in the year One thousand seven hundred and ninety six with interest at the rate aforesaid from & after the said eleventh day of November aforesaid until paid. And one other bond for Twenty thousand pounds conditioned for the payment of ten thousand pounds upon or before the eleventh day of May in the year One thousand seven hundred and ninety seven, with interest at the rate aforesaid from said eleventh day of November aforesaid, until paid, or on the delivery of any other personal security to the acceptance of us the said Samuel Nathaniel, David William and Thomas & also a deed of mortgage from him the said Samuel Ogden of the lands to be conveyed by the deed aforesaid as a collateral security for the payment of all the sums aforesaid, with the arising interest thereon And we the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis by virtue of the powers to us given as aforesaid, do in behalf of, & for the said Commonwealth of Massachusetts covenant with the said Samuel Ogden that upon his giving unto the said Commonwealth of Massachusetts all the securities real and personal aforesaid, as [fol. 1238] aforesaid, that we will enter into & make & seal unto him, his heirs, executors, administrators & assigns for and on behalf of the said Commonwealth of Massachusetts certain covenants that the said Commonwealth of Massachusetts shall from time to time by good and effectual deed or deeds of release, release to him his heirs and assigns, all rights arising to the said Commonwealth of Massachusetts by virtue of the mortgage deed to be given as aforesaid, to such part and parcels of the land therein contained (quantity & quality being considered) as shall be in proportion, as the said Ogden, Morris, and Wadsworth their heirs, executors or administrators, or the heirs, executors or administrators of either of them, shall pay & discharge of the principal of the said obligations, together with the interest due on such payment, which deed or deeds of release shall be for such part or parcels in severalty from the remainder, and in such place or places as the said Ogden his heirs or assigns shall choose, determine upon and fix by actual survey. And also that the said Commonwealth of Massachusetts shall from time to time appoint a Superintendant with powers to approve of any purchase or purchases which may be made by the said Ogden his heirs or assigns of the claims of the native Indians, he paying such Superintendant for his services.

In consideration of all which he the said Samuel Ogden covenants and agrees upon his part, that unless he shall procure & deliver to the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis for the use of the Commonwealth of Massachusetts, all the bonds made & executed to the said Commonwealth of Massachusetts as aforesaid for the sum aforesaid, or other personal security for the same several sums aforesaid to the acceptance

[fol. 1239] of the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis. & also the deed of mortgage aforesaid for the lands aforesaid, as collateral security for the several sums aforesaid within sixty days from the date of these covenants, the said sum of fifteen hundred pounds paid to the Treasurer of the Commonwealth of Massachusetts aforesaid shall be forfeited and remain to the use of the said Commonwealth of Massachusetts.

Provided nevertheless, that the said Samuel Ogden his Executors or Administrators or the said Robert Morris and Jeremiah Wadsworth or their executors or administrators, or the executors or administrators of either of them may at any time, within the several times limited and fixed for the several payments aforesaid, pay to the said Commonwealth of Massachusetts the whole, or any part of the sums aforesaid, over & above the sums at such time due upon either or any of the bonds aforesaid.

In witness of all which the parties have hereunto set their hands and seals the day and year aforesaid.

Samuel Ogden (Seal), Samuel Phillips (Seal), Nathaniel Wells (Seal), David Cobb (Seal), William Eustis (Seal), Thomas David (Seal).

Sealed, signed and delivered in presence of Thomas Walleut, David Morey.

I approve the above security as adequate.

James Sullivan.

A true copy. Attest:

John Avery, Jun., Secretary.

[fol. 1240] Whereas the Commonwealth of Massachusetts by the Committee & agents of the same viz' Samuel Phillips Nathaniel Wells, David Cobb, William Eustis and Thomas Davis upon the twelfth day of March, now last past, by the deed of covenants of the same Commonwealth under the hands and seals of the same Committee, did for the consideration therein mentioned covenant & agree to sell and convey to one Samuel Ogden of Delaware works in the State of Pennsylvania esquire, all the pre-emptive and other right and title which the said Commonwealth had to certain lands situate in the State of New York, bounded and described in the deed of covenants aforesaid—And whereas the said Commonwealth by the same Agents and Committee have this day granted and sold the same right and title to the same lands to Robert Morris esqur., at my request.

Now, in consideration of the same, and for and in consideration of the sum of five shillings to me in hand paid I the said Samuel Ogden do release to the said Commonwealth the same covenants for conveying such right, and all cause and action for not making, selling and conveying the same right to me according to the same covenants, and all demands for the same conveyance aforesaid, the sale and conveyance of said right to the said Robert Morris as aforesaid being in the place and stead of the deed mentioned in the

same Covenants to be made to me, all other parts of the same Covenants to remain good and valid to the said Robert to whom I have assigned the same.—In witness whereof I have hereunto affixed my hand and seal this eleventh day of May in the year of Our Lord One thousand seven hundred & ninety one.

Samuel Ogden. (Seal.)

Signed and delivered in presence of David Morey, Thomas Wallcut.

[fol. 1241] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

May 11th, 1791.

Then the said Samuel Ogden acknowledged the within to be his act and deed before me.

Ja. Sullivan, Jus. Peace.

A true copy. Attest:

John Avery, Jun. Secretary.

COMMONWEALTH OF MASSACHUSETTS:

I approve of the security given for the consideration money of this deed.

James Sullivan, Attorney General.

Whereas the General Court of the Commonwealth of Massachusetts by their resolve of the eighth day of March in the year of our Lord one thousand seven hundred and ninety one did appoint Samuel Phillips Nathaniel Wells, David Cobb, William Eustis & Thomas Davis esqrs. A committee with full powers and authority to bargain, sell and convey to Samuel Ogden esqr., his heirs and assigns, all & singular the right of pre-emption, and all other the title and interest of the said Commonwealth, in and unto all that tract of land lying in the State of New York, the right of pre-emption whereof the State of New York ceded, granted, released and confirmed to the Commonwealth of Massachusetts, their grantees and the heirs and assigns of such Grantees forever, saving and excepting such part or parts of said tract, the right of pre-emption whereof the said Commonwealth has ceded & granted to the United States of America, and also saving and excepting such part or parts of the same tract, the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps esqrs., their heirs or assigns by virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described; and also reserving one undivided sixtieth part of said tract, excepting such parts thereof as belong to the said United States, and said Gorham and Phelps by virtue of any cession from the Com-
[fol. 1242] monwealth aforesaid.

And whereas the above named Committee pursuant to the Resolve aforesaid did by their deed of Indenture bearing date the

twelfth day of March last, in consideration of the Covenants in the same Indenture mentioned covenant and agree with the said Ogden that they would sell and convey to him his heirs and assigns the pre-emptive and all other right and title which the said Commonwealth empowered the said Committee to convey by the resolve aforesaid.

And the said Samuel Ogden having by his deed, bearing even date with these presents relinquished his right to, & released his interest in the same covenants so far as they relate to a conveyance of the same right to the said territory to him, and having agreed that the right aforesaid shall be conveyed to Robert Morris, esqr., to whom he has assigned the covenants aforesaid, and that such conveyance to the said Morris shall in effect be considered as a compliance with the covenants aforesaid for a conveyance to him the said Ogden.

Now know all men by these presents that We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, and Thomas Davis, by virtue of the authority aforesaid, & in consideration of all the premises above recited, and in consideration of Fifteen thousand pounds lawful money of the said Commonwealth paid by Robert Morris of the City & County of Philadelphia in the State of Pennsylvania, esqr., or secured to be paid for the use of the said Commonwealth, have for and by the authority of the same Commonwealth given, granted, bargained, sold and conveyed, and by these presents for and in behalf of the said Commonwealth do give, grant, bargain, sell and convey to the said Robert Morris his heirs and assigns forever the pre-emptive right & all other right, title and [fol. 1243] interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract & territory above described, which parcel contains about eight hundred thousand acres more or less, and is bounded as follows, to wit. Beginning on the north line of Pennsylvania at a point west from the southwest corner of land confirmed to Nathaniel Gorham and Oliver Phelps esqrs and twelve miles distant therefrom, and from said point running west on said North line of the said State of Pennsylvania sixteen miles, from thence north on a meridian line to the dividing line between the United States and the dominion of the King of Great Britain, thence easterly on said dividing line until it comes to a point, from which a meridian line will fall upon the point of beginning, and on the same meridian line to the place of beginning, reserving out of the same granted premises one undivided sixtieth part thereof: To have & to hold to the said Robert Morris his heirs and assigns forever all the pre-emptive right and all other rights title and interest which the said Commonwealth hath in and to the said granted premises saving the reservations aforesaid, & the said Commonwealth doth hereby covenant and agree to & with the said Robert Morris his heirs and assigns that he & they shall hold and enjoy the same free from all claims & demand of all and every person claiming or holding for or by any right of the said Commonwealth.

In witness of all which the said Samuel Phillips, Nathaniel Wells David Cobb, William Eustis and Thomas Davis have hereunto set their hands and seals by virtue and force of the authority of the said Commonwealth the eleventh day of May in the year of Our Lord one thousand seven hundred & ninety one.

[fol. 1244] Samuel Phillips (Seal), Nathl. Wells (Seal), David Cobb (Seal), William Eustis (Seal), Thomas Davis (Seal).

Signed, Sealed and delivered in presence of Saml. Ogden, David Morey, Thomas Wallcut.

This deed is delivered into the hands of Nathaniel Appleton, John Lowell and Oliver Wendell esqrs. as an escrow to be delivered by them or any two of them, or the survivor of either two of them to the said Robert Morris, his heirs or certain Attorney upon his or their producing paid and cancelled to them or either two of them or to the survivors of either two of them, a bond of even date with the within deed given by the said Robert Morris & Samuel Ogden to the Treasurer of the said Commonwealth for fifteen thousand pounds lawful money of the Commonwealth of Massachusetts on or before the eleventh day of May One thousand seven hundred and ninety-four with lawful interest for the same from the eleventh day of November seventeen hundred and ninety-one.

Robert Morris, Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, Thomas Davis,

We the subscribers do hereby acknowledge that we have this day received a deed or instrument of which the foregoing is a true copy, to be by us applied and delivered at the time and for the purposes mentioned and described therein, and on the same.

Witness our hands at Boston this Seventeenth day of May in the [fol. 1245] year of Our Lord One thousand Seven hundred & ninety-one.

Nathaniel Appleton, John Lowell, Oliver Wendell.

A true copy. Attest:

John Avery, Jun., Secretary.

Whereas the General Court of the Commonwealth of Massachusetts by their resolve of the eighth day of March in the year of Our Lord One thousand seven hundred and ninety-one did appoint Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis esquires a Committee with full powers and authority to bargain sell and convey to Samuel Ogden esqr. his heirs and assigns all & singular the right of pre-emption, and all other the title & interest of the said Commonwealth, in and unto all that tract of land lying in the State of New York the right of pre-emption whereof the State of New York ceded granted released and confirmed to the Commonwealth of Massachusetts their grantees, and the heirs and assigns of such Grantees forever saving and excepting such part or parts of said tract, the right of pre-emption

whereof the said Commonwealth has ceded & granted to the United States of America and also saving and excepting such part or parts of the same tract the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps esqrs. their heirs or assigns, by virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described; and also [fol. 1246] reserving one undivided sixtieth part of said tract, excepting such parts thereof as belong to the said United States and said Gorham and Phelps by virtue of any cession from the Commonwealth aforesaid.

And whereas the above named Committee pursuant to the Resolve aforesaid did by their deed of Indenture, bearing date the twelfth day of March last in consideration of the covenants in the same indenture mentioned, covenant and agree with the said Ogden that they would sell & convey to him his heirs and assigns the pre-emptive and all other right and title which the said Commonwealth empowered the said Committee to convey by the Resolve aforesaid. And the said Samuel Ogden having by his deed bearing even date with these presents relinquished his right to and released his interest in the same covenants so far as they relate to a conveyance of the same right to the said territory to him, and having agreed that the right aforesaid shall be conveyed to Robert Morris esquire to whom he has assigned the covenants aforesaid, and that such conveyance to the said Morris shall in effect be considered as a compliance with the Covenants aforesaid for a conveyance to him the said Ogden.

Now know all men by these presents that We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis by virtue of the authority aforesaid, and in consideration of all the premises hereinbefore recited, and also in consideration of the sum of fifteen thousand pounds lawful money of the said Commonwealth paid by Robert Morris of the city and County of Philadelphia, & State of Pennsylvania esqr., or secured to be paid for the use of the said Commonwealth, have for, and by the authority of the same Commonwealth given, granted bargained sold and conveyed, and by these presents for and in behalf of the said Common- [fol. 1247] wealth do give, grant, bargain sell and convey to the said Robert Morris, his heirs and assigns forever the pre-emptive right, and all other right title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract and territory above described, which parcel contains about eight hundred thousand acres, more or less, and is bounded as follows, to wit: Beginning on the north line of the State of Pennsylvania at a point west from the southwest corner of the land confirmed to Nathaniel Gorham and Oliver Phelps esquires twenty-eight miles distant therefrom—thence running west on the said Pennsylvania line sixteen miles, then north to the line in the lake Ontario, which divides the dominions of the King of Great Britain from the United States of America, then easterly by that line to a point, from whence a meridian line will fall on the point of beginning, thence on the same meridian line to the place of beginning, reserving out of the same granted premises, one undivided sixtieth part thereof.

To have and to hold to the said Robert Morris his heirs & assigns forever all the pre-emptive right, and all other right, title and interest which the said Commonwealth hath in and to the said granted premises, saving the reservations aforesaid. And the said Commonwealth doth hereby covenant and agree to and with the said Robert Morris his heirs and assigns, that he and they shall hold and tnjoy the same free from all claims and demands of all and every person claiming or holding for or by any right of the said Commonwealth.

In witness of all which the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, and Thomas Davis have hereunto set their hands and seals by virtue and force of the authority of the said Commonwealth the eleventh day of May in the year of Our Lord, [fol. 1248] One thousand seven hundred and ninety-one.

Samuel Phillips (Seal), Nathaniel Wells (Seal), David Cobb (Seal), William Eustis (Seal), Thomas Davis (Seal).

Signed, sealed and delivered in presence of Samuel Ogden, David Morey, Thomas Wallcut.

Commonwealth of Massachusetts:

I approve of the security given for the consideration money of this Deed.

James Sullivan, Attorney Genl.

This Deed is delivered into the hands of Nathaniel Appleton, John Lowell, and Oliver Wendell Esqrs. as an escrow to be delivered by them or any two of them, or the survivor of either two of them to the said Robert Morris his heirs or certain Attorney, upon his or their producing paid and cancelled, to them, or either two of them, or to the survivor of either two of them, a bond of even date with the within deed, given by the said Robert Morris and Samuel Ogden to the Treasurer of the Commonwealth of Massachusetts conditioned for the payment of fifteen thousand pounds lawful money of the same Commonwealth on or before the eleventh day of May One thousand seven hundred and ninety five with lawful interest for the same from the eleventh day of November One thousand seven hundred and ninety one.

Robert Morris, Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, Thomas Davis.

We the subscribers do hereby acknowledge that We have this day received a deed or instrument, of which the foregoing is a true copy, to be by us applied, and delivered at the time, and for the purposes [fol. 1249] mentioned and rescribed therein, & on the same —.

Witness our hands at Boston this seventeenth day of May in the year of Our Lord One thousand seven hundred and ninety one.

Nathaniel Appleton, John Lowell, Oliver Wendell.

A true copy. Attest:

John Avery, Jun., Secretary.

COMMONWEALTH OF MASSACHUSETTS:

I approve of the Security given for the consideration of this Deed.
James Sullivan, Attorney General.

Whereas the General Court of the Commonwealth of Massachusetts by their Resolve of the eighth day of March in the year of our Lord, One thousand seven hundred and ninety one did appoint Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis a Committee with full powers and authority to bargain, sell and convey to Samuel Ogden Esqr., his heirs and assigns, all & singular the right of pre-emption, and all other the title and interest of the said Commonwealth, in and unto all that tract of land lying in the State of New York, the right of pre-emption whereof the State of New York ceded, granted, released and confirmed to the Commonwealth of Massachusetts, their grantees, and the heirs & assigns of such Grantees forever, saving and excepting such part or parts of said tract, the right of pre-emption whereof the said Commonwealth has ceded and granted to the United States of America; and also saving and excepting such part or parts of the same tract, the pre-emptive right of which now belongs to Oliver Phelps and Nathaniel Gorham esqrs, their heirs or assigns by virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described, and also re-[fol. 1250] serving one undivided sixtieth part of said tract, excepting such parts thereof as belong to the said United States and said Gorham and Phelps, by virtue of any cession from the Commonwealth aforesaid.

And whereas the above named Committee pursuant to the Resolve aforesaid, did by their deed of Indenture bearing date the twelfth day of March last in consideration of the Covenants in the same Indenture mentioned, covenant and agree with the said Ogden, that they would sell and convey to him, his heirs and assigns the pre-emptive and all other right and title which the said Commonwealth empowered the said Committee to convey by the Resolve aforesaid.

And the said Samuel Ogden having by his deed bearing even date with these presents, relinquis-ed his right to, and released his interest in, the same covenants, so far as they relate to a conveyance of the same right to the said territory to him, and having agreed that the right aforesaid shall be conveyed to Robert Morris esqr. to whom he has assigned the covenants aforesaid, and that such conveyance to the said Morris shall in effect be considered as a compliance with the covenants aforesaid for a conveyance to him the said Ogden.

Now know all men by there presents that We the said Samuel Phillips Nathaniel Wells, David Cobb, William Eustis and Thomas Davis by virtue of the authority aforesaid and in consideration of all the premises herein before recited; and also in consideration of the sum of Fifteen thousand pounds lawful money of the said Commonwealth paid by Robert Morris of the city & county of Philadelphia and State of Pennsylvania esqr. or secured to be paid for the use of the said Commonwealth have for, and by the authority of the same Commonwealth, given, granted, bargained, sold and conveyed, and

[fol. 1251] by these presents for and in behalf of the said Commonwealth, do give, grant, bargain, sell and convey to the said Robert Morris, his heirs and assigns forever the pre-emptive right and all other right title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract & territory above described, which parcel contains about eight hundred thousand acres more or less and is bounded as follows to wit, beginning on the north line of the State of Pennsylvania at a point west from the southwest corner of land confirmed to Nathaniel Gorham & Oliver Phelps esquires, forty four miles distant therefrom, thence running west on the said Pennsylvania line sixteen miles, then north to the line in the lake Ontario which divides the dominions of the King of Great Britain from the United States of America, then easterly by that line to a point from whence a meridian line will fall on the point of beginning, then on the same meridian line to the place of beginning, reserving out of the same granted premises one undivided sixtieth part thereof; to have and to hold the said Robert Morris his heirs and assigns forever all the pre-emptive right, and all other right, title and interest which the said Commonwealth hath in and to the said granted premises saving the reservation aforesaid. And the said Commonwealth do hereby covenant and agree to and with the said Robert Morris his heirs and assigns that he and they shall hold and enjoy the same free from all claims of all and every person claiming or holding for or by any right of the said Commonwealth.

In witness of all which the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis have hereunto set their hands and seals by virtue and force of the authority of the said Commonwealth, the eleventh day of May in the year of our Lord, [fol. 1252] One thousand seven hundred and ninety one.

Samuel Phillips (Seal), Nathaniel Wells (Seal), David Cobb (Seal), William Eustis (Seal), Thomas Davis (Seal).

Signed, sealed and delivered in presence of us. Samuel Ogden, David Morey, Thomas Wallcut.

This Deed is delivered into the hands of Nathaniel Appleton, John Lowell, and Oliver Wendell esqurs. as an escrow to be delivered by them or any two of them, or the survivor of either two of them to the said Robert Morris his heirs or certain Attorney, upon his or their producing paid and cancelled, to them, or either two of them, or to the survivor of either two of them, a bond of even date with the within deed, given by the said Robert Morris and Samuel Ogden to the Treasurer of the Commonwealth of Massachusetts conditioned for the payment of fifteen thousand pounds lawful money of the same Commonwealth on or before the eleventh day of May seventeen hundred ninety six, with lawful interest for the same from the eleventh day of November seventeen hundred and ninety one.

Robert Morris, Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, Thomas Davis.

We the subscribers do hereby asknowledge that We have this day received a deed or instrument, of which the foregoing is a true copy, to be by us applied, and delivered at the time, and for the purposes mentioned and described therein, and on the same.

Witness our hands this Seventeenth day of May in the year of Our [fol. 1253] Lord One thousand seven hundred and ninety one at Boston.

Nathaniel Appleton, John Lowell, Oliver Wendell.

A true copy. Attest:

John Avery, Jun., Secretary.

COMMONWEALTH OF MASSACHUSETTS:

I approve of the security given for the consideration money of this Deed.

James Sullivan, Attorney General.

Whereas the General Court of the Commonwealth of Massachusetts by their Resolve of the eighth day of March in the year of our Lord, One thousand seven hundred and ninety one did appoint Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis & Thomas Davis esquires a Committee with full powers and authority to bargain, sell and convey to Samuel Ogden esquire, his heirs and assigns, all and singular the right of pre-emption, and all other the title and interest of the said Commonwealth, in and unto all that tract of land lying in the State of New York, the right of pre-emption whereof the State of New York granted, released and confirmed to the Commonwealth of Massachusetts, their grantees, the heirs and assigns of such Grantees forever, saving and excepting such part or parts of said tract, the right of pre-emption whereof the said Commonwealth has ceded and granted to the United States of America, and also saving and excepting such part or parts of the same tract, the pre-emptive right to which now belongs to Nathaniel Gorham and Oliver Phelps esquires, the heirs or assigns by virtue of any grant or confirmation from the said Commonwealth, however the same tract is or may be bounded or described, and also re- [fol. 1254] serving one undivided sixtieth part of said tract, excepting such parts thereof as belong to the said United States and said Gorham and Phelps, by virtue of any cession from the Commonwealth aforesaid.

And whereas the above named Committee pursuant to the Resolve aforesaid did by their deed of Indenture bearing date the twelfth day of March last, in consideration of the Covenants in the same Indenture mentioned covenant and agree with the said Ogden that they would sell and convey to him, his heirs and assigns the pre-emptive and all other right and title which the said Commonwealth empowered the said Committee to convey by the Resolve aforesaid. And the said Samuel Ogden having by his deed bearing even date with these presents reliquished his right to, and released his interest in the same covenants so far as they relate to conveyance of the same right to the said territory to him, and having agreed that the right

aforesaid shall be conveyed to Robert Morris esqr. to whom he has assigned the covenants aforesaid, and that such conveyance to the said Morris shall in effect be considered as a compliance with the covenants aforesaid for a conveyance to him the said Ogden.

Now know all men by these presents that We the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis by virtue of the authority aforesaid, and in consideration of all the premises above recited, and in consideration of ten thousand pounds lawful money of the said Commonwealth paid by Robert Morris of the City and County of Philadelphia in the State of Pen-sylvania *esquire,* or secured to be paid for the use of the said Commonwealth have for, and by authority of the same Commonwealth given, granted, bargained & sold and conveyed, and by these presents, for and in the behalf of the said Commonwealth do give, grant, bargain, sell and convey to the said Robert Morris, his heirs [fol. 1255] and assigns forever the pre-emptive right, and all other right, title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract and territory above described, which parcel contains about eight hundred thousand acres more or less, and is bounded as follows to wit, beginning at a point on the north line of the State of Pennsylvania sixty miles west of the southwest corner of the land confirmed to Nathaniel Gorham and Oliver Phelps from said point running west until it meets the land ceded by the Commonwealth of Massachusetts to the United States of America and by said United States sold to the State of Pen-sylvania, thence northerly by the land ceded as aforesaid to Lake Erie, from thence north easterly by Lake Erie to a tract of land lying on the easterly side of the streight of Niagara belonging to the State of New York, thence northerly by said tract, to a line in Lake Ontario which divides the dominions of the King of Great Britain, and the said United States, thence easterly on said dividing line to a point from whence a meridian line will fall on the point of beginning, thence southerly on the same meridian line to the place of beginning, together with the right of pre-emption which the Commonwealth hath to all Islands or Waters in Lake Erie, by virtue of any cession from the State of New York to said Commonwealth, reserving out the same granted premises one undivided sixtieth part thereof.

To have and to hold to the said Robert Morris his heirs and assigns, forever, all the pre-emptive right, title and interest which the Commonwealth hath in and to the said granted premises saving the reservations aforesaid.

And the said Commonwealth doth hereby covenant and agree to and with the said Robert Morris his heirs and assigns that he and [fol. 1256] they shall hold and enjoy the same free from all claims and demands of all & every person claiming or holding for or by any right of the said Commonwealth.

In witness of all which the said Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis have hereunto set their hands and seals by virtue and force of the authority of the

said Commonwealth the eleventh day of May, in the year of Our Lord One thousand seven hundred and ninety one.

Samuel Phillips & a seal, Nathanel Wells & a seal, David Cobb & a seal, William Eustis & a seal, Thomas Davis & a seal.

Signed, sealed & delivered in presence of us. Samuel Ogden, David Morey, Thomas Wallcut.

This deed is delivered into the hands of Nathaniel Appleton, John Lowell, and Oliver Wendell esquires as an escrow to be delivered by them or any two of them, or the survivor of either two of them to the said Robert Morris his heirs or certain attorney upon his or their producing paid and cancelled to them or either two of them or to the survivor of either two of them a bond of even date with the within deed given by the said Robert Morris and Samuel Ogden to the Treasurer of the Commonwealth of Massachusetts conditioned for the payment of Ten thousand pounds lawful money of the same Commonwealth on or before the eleventh day of May Seventeen hundred and ninety seven with lawful interest for the same, from the [fol. 1257] eleventh day of November seventeen hundred and ninety one

Robert Morris, Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis, Thomas Davis.

We the subscribers do hereby acknowledge that We have this day received a deed or instrument of which the aforegoing is a true copy, to be by us applied and delivered at the time and for the purposes mentioned & described therein and on the same.

Witness our hands this seventeenth day of May in the year of Our Lord One thousand seven hundred and ninety one, at Boston.

Nathaniel Appleton, John Lowell, Oliver Wendell.

A true copy. Attest:

John Avery, Jun., Secretary.

Record of Bonds and payments see from page 141 to 148.

Commonwealth of Massachusetts:

July 16th, 1791.

Received of John Avery, jun., esqr., Secretary the Indenture, Release, and the four deeds which are recorded on the twenty one preceding pages agreeably to a Resolve of 17th June last.

Alex Hodgdon, Treasr.

[fol. 1258] DEFENDANT'S EXHIBIT 35

(See p. 830 of Minutes)

Document 106, United States House of Representatives 20th Congress, Second Session, entitled Survey of Genesee River, Lake Ontario, etc.

[Doc. No. 106]

20th Congress, 2d Session

Survey Genesee River, L. Ontario, Oswego River

Letter from The Secretary of War Transmitting Report of a Survey of Genesee River, the South Shore of Lake Ontario, Between the Genesee and Oswego Rivers, and Big Sandy Creek, in the State of New York.

February 3, 1829.—Read, and referred to the Committee on Commerce.
March 3, 1829.—Ordered to be printed.

Department of War, February 2, 1829.

SIR: In obedience to the resolutions of the House of Representatives of the 14th and 15th instant I have the honor to transmit herewith a copy of the report of the Engineer appointed, under the act of the 23d of May last, to make a survey of Genesee river and harbor, of the mouth of Sandy creek, and of the southern shore of Lake Ontario, in the State of New York, between the Genesee and Oswego rivers.

I have the honor to be your obdt. servant.

P. B. Porter.

Hon. Andrew Stevenson, Speaker of the House of Representatives

Erie, January 22, 1829.

To Col. Charles Gratiot, Chief Engineer:

SIR: Agreeably to instructions received from the Engineer Department, under date of the 9th of June last, directing to me the execution of the following surveys, for which appropriations were made by Congress at its last session, viz: "For making a survey of Genesee river and harbor in the State of New York, and estimate of the cost of improving the same, $300;" "For making a survey and examination of the southern shore of Lake Ontario, between Genesee and Oswego rivers, with a view to the improvement of the most accessible and commodious harbors on the frontier, and estimates of cost of the same, $400;" "For surveying the mouth of Sandy creek, which discharges itself into Mexico bay on Lake Ontario, for the purpose of constructing a harbor at that place, and

estimating the cost for the same, $300;" I have now the honor to submit the following

[fol. 1259] Report

Owing to the inability of the Department to furnish me with an officer to assist me in executing the above instructions, and the necessity of procuring the necessary instruments from the city of New York for making the surveys, the commencement of operations was delayed until the 14th of October last, when a civil party was organized, and entered into their respective duties.

Having made a general reconnoissance of the south shore of Lake Ontario from Genesee river to Oswego, and from thence to the mouth of Big Sandy creek, for the purpose of selecting such harbors between these points as appeared to be most accessible, not only in a commercial, but also in a military point of view, which would hereafter, should any collision take place with our neighbors on that frontier, be the means of a more efficient protection on that side of the Union.

With these views, three principal points have been selected, nearly equidistant from each other, which appear to combine those advantages; and they are so placed as if they formed the principal arteries of the main one, (the Erie canal,) which unites the great western lakes with the Atlantic. These are the Genesee river. Big Sodus bay, and Oswego river, which are considered of primary importance: next to those may be added, Pulteneyville bay, Little Sodus bay, and Big Sandy creek.

In order to execute the provisions of the act of Congress, I intrusted the surveys required by it to an experienced civil surveyor, Col. Forster, of Erie, Pennsylvania. The first operation commenced by him was at the mouth of Genesee river, the result of which is as follows:

Genesee River

The source of Genesee river rises on a table land in the northern part of Pennsylvania, nearly in 42° north latitude, interlocking with the principal streams which flow into the Susquehannah and Allegany rivers. From thence it runs a little east of north through Pennsylvania into the State of New York, from which point it assumes a more northwesterly direction, for about 40 miles, to the Canedde Reservation; whence it nearly resumes its original course, through the counties of Allegany, Livingston, and Monroe, in the State of New York, to lake Ontario, a distance of about 150 miles, watering with its tributaries one of the most fertile valleys in that State. It has six falls in its course, amounting to 384 feet, besides numerous rapids; however, it is navigable for boats at least 90 miles, and for sloop navigation about 4 miles, to its mouth; and, from the improvements which it is susceptible of, it can be made navigable, by a canal from its source to its last fall below the village of Carthage at which place the lake navigation commences. It also can be easily connected with the Allegany river by means of a canal,

which, when executed, will give an inland navigation from the great western lakes, by the Welland canal, now in operation, around the falls of Niagara, to Pittsburg, and from thence to the Gulf of Mexico.

The principal village on this stream is Rochester. It was founded in a wilderness in 1812 and such has been its rapid growth and prosperity, that it now contains, by estimate, 11,000 inhabitants, be- [fol. 1260] sides numerous manufactories of grain, and a prospect of extending them to other branches of domestic industry.

After leaving the village of Rochester, we next come to its port and harbor, "the mouth of Genesee river," on which much of its future commerce depends.

From the last falls of the Genesee river to its mouth, as already stated, is 4 miles of good sloop navigation, the depth varying from 18 to 27 feet of water, thereby affording a commodious and safe harbor; but unfortunately, it is obstructed by a bar of sand, which nearly reaches a half of a mile into the lake. Through this bar there is a meandering channel to the east, where vessels drawing 8 feet may enter at particular times; but its irregular course forbids the attempt in heavy winds. In order to remedy this evil, it is proposed to straighten and deepen the channel, by constructing piers for that purpose, as is represented on the map accompanying this report, marked No. 1, which, with the assistance of a strong current, which prevails in the spring months, will unquestionably remove the obstructions.

The details for executing this plan will be better understood than if described, by an inspection of map No. 6, also accompanying this report.

Little need be said in reference to the importance of having a good harbor in his part of Lake Ontario; nor is it intended to detail the many advantages to be derived from the accomplishment of such a project. The increasing population of the shores of the upper lakes, and the fertility of the soil, combined together, must produce a corresponding increase of surplus products, which will have this additional channel to a northern market: this and many other considerations invite the accomplishment of a good harbor at this point.

The party, having accomplished the survey of Genesee river, proceeded to the examination and survey of Big Sodus bay; passing by Irondequoit bay and Pultneyville bay; the former being too near to the mouth of Genesee river (only 4 miles east) to be of any importance; and the latter was left to be examined on the return of the party.

Big Sodus Bay

Big Sodus bay is situated 30 miles east of Genesee river, and 25 miles west of Oswego. It is a spacious and commodious bay, of about 15 miles in circuit, including its coves and points; besides which, it has three islands of considerable size. The water in it is clear and deep; sufficiently so to float ships of the line. However, this beautiful basin is inaccessible to vessels drawing more than 8 feet of water, owing to a sand and pebbly bar, under water, stretch-

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ing entirely across its entrance, which is 1,150 yards wide. This bar has been formed by the action of the sea carrying along with it the sand, gravel and pebbles, along the shores, in successive and increasing points, until they finally produced the bar which obstructs the entrance into that bay.

Before entering into an explanation of the means proposed to remedy the evil, which renders this bay in a measure useless, it is proper to state by what agency it is to be accomplished.

The basin of Big Sodus bay is situated, as it were, in the bottom of a great open bay formed by Braddock's point, 7 miles N. W. of Genesee river, and New Haven point, 6 miles N. E. of Oswego; whose chord is 63 miles, and its perpendicular 11 miles. Into this [fol. 1261] open bay the waters of Lake Ontario above and opposite to it are driven by the prevailing north and northwest winds, which causes them to flow into all the inlets and bays included in its arc, thereby raising the water several feet. As soon as these winds subside, or else a shift of them, the level of the water in the lake then becomes lower than those of the inlets and bays above cited: the consequence of which is that a strong current passes over the bars, obstructing the entrance into those inlets and bays to the lake.

Having satisfactorily ascertained that a current exists in Big Sodus bay, a project has been formed for removing the obstructions, similar to the one successfully executed at Presqu' Isle bay, Pennsylvania, viz:

By contracting the entrance into the bay with a dyke, and to extend across the bar, from deep water inside to deep water outside, two piers, of sufficient stability to resist the action of the seas. The result expected to be produced will be to increase the velocity of the current, which will carry out the sand between the piers into the lake; whence it will be thrown to the leeward of the piers, as the winds may prevail east or west, and will finally be driven against the dyke by the north winds: this operation will undoubtedly remove the sand; but a portion of the bar (30 yards) is composed of large round pebbles, which, it is believed, no current, however strong, will remove. It is therefore proposed to remove this small portion of the bar with suitable tongs, and to use the pebbles raised by them in the construction of the work.

By an examination of map No. 2, herewith enclosed, the proposed project is fully illustrated, and as respects the details of construction they are exemplified on map No. 6.

Should it even become a policy with the United States to maintain a naval force on Lake Ontario, no point on its south shore presents greater advantages (after the removal of the bar) than Big Souds bay for a naval depot. The contemplated canal from that bay to Montezuma, (a project which is in agitation,) and from thence, by either the Cayuaga or Seneca lake, to the Susquehanna, will open the resources of the central States of the Union to this point. Besides which, its position is perfectly secure, and can be admirably fortified. The two opposite points, forming the entrance into the bay, and the islands in it, afford excellent sites for works of defense; and the coves along its shores furnish suitable sites for

naval establishments. It is here proper to remark, that, in the vicinity of the bay, iron ore is found in abundance; and when the contemplated canal to Montezuma is accomplished, founderies may be established here, by means of the water power which it will afford; the fuel for which can be procured, by extending the water communication to the coal regions on the Susquehannah.

Besides the advantages which Big Sodus bay possesses as a harbor, it will also be the means, by its canals, of opening great inland communications with three of our principal cities on the Atlantic, viz: New York, by the great Erie canal; Philadelphia, by Seneca lake, and canal to the Susquehannah, and Union canal; and Baltimore, by the Susquehannah and Chesapeake bay.

From the froegoing it will be seen how important the improvement of Big Sodus bay is, not only to the western part of New York, but to the Union in general. East of Big Sodus bay, are found in succession, East Port, and Little Sodus bays. The proximity of the two former to Big Sodus bay makes them of little importance, and [fol. 1262] therefore they were not surveyed; and the latter having been selected, was surveyed on the return of the party, which will hereafter be reported on.

From Big Sodus bay, the party proceeded to inspect Oswego harbor, as being one of the great links to the general improvement of the harbors on Lake Ontario.

Oswego Harbor

Congress, at its session before last, appropriated a certain sum for securing Oswego harbor from the violent storms of Lake Ontario, and to render it accessible to vessels at all times. The execution of the act was, by the Engineer Department, directed to an officer of engineers, who repaired to Oswego, and entered into the duties assigned him by projecting a plan for the formation of an outer harbor, and entering into a contract for the execution of the same, under an agent and superintendent. The plan projected is judicious, and is highly creditable to the officer who projected it, and when completed, will answer the expectations of the Government. While the plan was in a train of successful operation, a part of the work, in an unfinished state, was materially injured, by an unexpected and violent storm, which occurred in October last. Had it been finished, it would have stood, as that part of it which was completed resisted the violence of the storm. It is due to the contractor to state that the work executed by him, from an inspection made, is done in a faithful manner. As an additional security to this important harbor, I beg leave to recommend that a mole of stone (à pierre perdu) be formed on the outside of the work next to the lake, as is represented on map No. 7, an estimate for which is annexed to this report.

A canal from this harbor to the Erie canal at Syracuse has just been completed, which will soon add another great inland navigation from the western lakes, by the Welland canal, to the Atlantic.

Leaving Oswego, the party proceeded to the examination and survey of Big Sandy creek, which empties into Mexico bay.

Big Sandy Creek

Before reporting the result of the survey and examination of Big Sandy Creek, it is deemed proper to be informed of its location.

Mexico bay, situated at the lower end of Lake Ontario, is formed by New Haven point to the southwest, and Stony point to the north. It receives into it the following streams, viz: Big and Little Sandy creeks, Salmon and Little Salmon rivers; which includes a circuit of nearly 40 miles, forming a large open bay, exposed to the tempestuous winds of the lake. Along the whole of this circuit, there is not a single natural harbor, but what is obstructed or closed by extensive bars with very little water on them; and as vessels are frequently driven into them, there is no hope of escape for them, the seas being so powerful that they cannot stretch out, so as to clear either of the points forming the bay; in consequence of which, for the want of an entrance into the creeks and rivers which flow into this bay, they are unavoidably driven on the shore, frequently sacrificing lives and property. Hence is the necessity of improving some of the above named streams; for which purpose a survey of Big Sandy creek has been made, and a plan prepared for removing the [fol. 1263] evil which now exists at its entrance.

Big Sandy Creek, as already stated, empties itself into Mexico bay, and is 25 miles N. E. of Oswego. It is a creek with two principal branches, meeting at its confluence with the bay, both of which meander through an extensive marsh, whose length is about four miles, and its width about one mile or more, having a sufficient depth of water, in their course through the marsh, for merchant vessels navigating the lake and no further. At its confluence it is obstructed by an extensive bar, extending into the bay 520 yards, on which there is little or no depth of water. This bar is composed of sand and gravel, driven in by the seas rolling into the bay; and such has been the quantity thus thrown in, that high sand hills have been raised on both sides of the outlet of the creek, presenting a formidable protection to the harbor inside. To remove the bar which now obstructs the entrance into this creek, it is proposed to construct two parallel piers across the bar, leaving a channel between them 100 feet wide, except at its mouth, where it will gradually widen to 150 feet, so as to afford an easier and secure entrance.

It is to be regretted, that, along so perilous a coast, and so fertile a country bordering on it, and its interior, larger and stronger streams are not to be found than those mentioned; as the velocity and quantity of current required to remove the obstructions at the mouth of streams should be such as to keep open any artificial channel that may be made, leading into them. However, situated as Sandy creek is, at the eastern extremity of the lake, it has this advantage, that, in the spring of the year, the greatest quantity of water descends it, while, at the same time, easterly winds prevail, which permit the current to pass freely into the bay, from which, it is to be hoped that the projected plan will have the desired effect; in which case, besides affording a port of refuge to vessels

driven into the bay, it will be the means of directing the surplus products of the fertile counties of Lewis and Jefferson through this channel to a market. Four and a half miles above the mouth of this creek, on the right bank of its south branch, is the village of Ellisbury, possessing considerable water privileges for manufactories, whose future prosperity greatly depends on opening its harbor.

Having completed the survey of Big Sandy creek, Little Sodus bay was next examined and surveyed.

Little Sodus Bay

Little Sodus bay is situated midway between Big Sodus bay and Oswego. It is, like Big Sodus bay, a spacious and commodious harbor, 1¾ miles in length, and three-quarters of a mile in width; besides an extensive and deep cove at its head, with a great depth of water in it. Along its shores there are many fine sites for buildings; and it may be considered, in point of beauty, next to Big Sodus bay, possessing nearly the same advantage and appearances. Its entrance is also obstructed by a gravelly bar, which is out of the water, closing it, with the exception of two small outlets; one in its centre, and the other to the east.

This bay can be improved in the same manner as proposed for Big Sodus bay, and at a less expense, as the dry gravelly bar which closes it answers the purpose of a dyke. As respects the plan for so doing, [fol. 1264] it is believed unnecessary to detail, as it is the same, with the exception of a dyke, as projected for Big Sodus bay.

In the vicinity of this bay, there is an extensive tract of fertile country, besides minerals of iron and salt, which are left idle, for the want of an accessible harbor. Should this bay be improved, the evils complained of would be removed, as it would invite the industrious and enterprising class of our population from the east to migrate to this spot, thereby adding additional prosperity and security to this important feature of our frontier.

The next and last place examined was Pultneyville bay.

Pultneyville Bay

Pultneyville bay, 19 miles east of Genesee river, and 10 miles west of Big Sodus bay, is an indentation in the south shore of Lake Ontario, being well protected to the west by a projecting point which secures it from S. W. winds, which are frequent and violent on this lake. It is, however, much exposed to winds from west round to east, and, therefore, cannot be considered a safe road-stead, though its anchorage is good.

By an inspection of map No. 5, it will be seen that it is also a shallow bay, having but little depth of water in it; though sufficiently so for merchant vessels navigating the lake. It is, however, susceptible of being improved by erecting a breakwater from the point which protects it from S. W. winds, in an eastern direction, 400

yards, from whence, at right angles with it, 150 yards towards the shore. leaving two openings, one to the north and the other to the east, the latter of which can be hereafter closed if found necessary. The plan could be much enlarged, but the one proposed is believed sufficiently large for commercial purposes at this place.

The village of Pultneyville is situated immediately on this bay; it may also be considered as claiming some attention to its future prosperity; the fertility of the soil in its vicinity, its situation, and the enterprise of its citizens, in having already expended large sums for affording a protection to their harbor, should not be overlooked.

Accompanying this report are the following drawings and documents, viz.:

No.		Scale
1.	Map of the mouth of Genesee river,	600 yards to 12 inches.
2.	Do. do. Big Sodus bay,	1,760 " to 12 "
3.	Do. do. Big Sandy creek,	600 " to 12 "
4.	Do. do. Little Sodus bay,	1,760 " to 12 "
5.	Do. do. Pultneyville,	600 " to 12 "
6.	Do. do. Oswego (engraved)	2,400 " to 12 "
7.	Do. details of piers and dykes, scale 10 feet to 1 inch.	
8.	Estimate for removing obstructions at Genesee river.	
9.	Do. do. do. do. Big Sodus bay.	
10.	Do. do. do. do. Big Sandy creek.	
11.	Do. do. do. do. Little Sodus bay.	
12.	Do. a breakwater for Pultneyville bay.	
13.	Do. an additional protection to Oswego harbor.	
14.	Statistical table of the counties to be benefitted by the proposed improvements.	
15.	Geological remarks.	

All which is respectfully submitted.

Theo. W. Maurice, Capt. of Engineers.

[fol. 1265] No. 8

Estimate of the Probable Cost of Two Piers for Removing the Obstructions at the Mouth of Genesee River, on Lake Ontario, in the State of New York

Dimensions and Extent

West pier, length		690 yards.
breadth	14 feet.	
average depth from top to bottom	16	
East pier, length		600
breadth	14	
average depth from top to bottom	16	
Total length of work		1,290 yards.

West Pier

Materials:		
2,208 logs of timber 30 feet long, 14 inches diameter at the small end, each at 75 cents	$1,656.00	
2,415 tie pieces, 16 feet long, 9 inches diameter, at 24 cents	579.60	
414 white oak piles, 25 feet long, 12 inches diameter in the centre, 75 cents.	310.50	
207 securing ties, 18 feet long, 10 inches diameter, 36 cents	74.52	
4,140 cubic feet of square oak timber, 12 inches square, for cap pieces, 8 cents	331.20	
3,105 cords of stone, delivered in the piers, $3	9,315.00	
30,000 feet plank, two inches thick, $15	450.00	
Collecting and putting brush in 69 piers, $5	345.00	
		13,061.82
Workmanship:		
1 superintendent, 600 days, at $3	1,800.00	
1 chief carpenter, do $2.50	1,500.00	
4 carpenters, 20 months each, 80 months, $30	2,400.00	
15 laborers, board included, 20 months each, 300 months, $18	5,400.00	
		11,100.00
Iron work and tools:		
10,000 pounds iron for bolts and pile bands complete, 15 cents	1,500.00	
2,888 pounds spikes for planking	288.80	
Tools for carpenters and laborers	150.00	
		1,938.80
Cost of west pier		$26,100.62

[fol. 1266] East Pier

Materials:		
1,920 logs of timber, 30 feet long, 14 inches diameter at the small end, each at 75 cents	$1,440.00	
2,100 tie pieces, 16 feet long, 9 inches diameter, 24 cents	504.00	
360 white oak piles, 25 feet long, 12 inches diameter in the center, 75 cents	270.00	
180 securing ties, 18 feet long, 10 inches diameter, 36 cents	64.80	
3,600 cubic feet square oak timber, 12 inches square, for cap pieces, 8 cents	288.00	
2,700 cords of stone, delivered in the piers, $3	8,100.00	
26,000 feet plank, two inches thick, $15	390.00	
Collecting and putting brush in 60 piers, $5	300.00	
		11,356.80
Workmanship:		
1 superintendent, 480 days, at $3	1,440.00	
1 chief carpenter, 480 do $2	1,200.00	
4 carpenters, 16 months each, 64 months, $30	1,920.00	
15 laborers, 16 months each, 240 months, $18	4,320.00	
		8,880.00
Iron and tools:		
8,000 pounds of iron for bolts and pile bands, complete, 15 cents	1,200.00	
1,800 lbs. spikes for planking, 10 cents	180.00	
Tools for carpenters and laborers	100.00	
		1,480.00
Cost of east pier		21,716.80
Machinery for the two piers:		
1 pile driver, complete	500.00	
2 crane scows, each $200	400.00	
1 open do	100.00	
2 skiffs, each $25	50.00	
Blocks and cordage	150.00	
Cost of machinery		1,200.00
Cost of the west pier		26,100.62
Cost of the east pier		21,716.80
Cost of the two piers and machinery		49,017.42
[fol. 1267] Brought over		49,017.24
Add 10 per cent for contingencies		4,901.74
Total cost of work		$53,919.16

Remark.—The time estimated on workmanship, for constructing the two piers, are four and a half seasons of eight months each, viz: two and a half seasons to construct the west pier, and two seasons to construct the east.

No. 9

Estimate of the Probable Cost of a Dyke and Two Piers for Removing the Obstructions at the Entrance of Big Sodus Bay, on Lake Ontario, in the State of New York

Dimensions and Extent

Dyke, length	....	1,140 yards
breadth	18 feet	
average depth from top to bottom	9 feet	
West pier, length	....	330
breadth	14 feet	
average depth from top to botton	16 feet	
East pier, dimensions the same as west pier	....	330
Total length of work		1,800 yards

Dyke

Materials:

1,952 logs of timber, 30 feet long, 14 inches diameter at the small end, each at 75 cents	$1,464.00	
2,280 tie pieces, 20 feet long, 10 inches diameter, 30 cents	684.00	
12,768 cubic feet square timber for sills, 14 x 14, 6 cents	776.08	
6,384 cubic feet square timber for posts, 14 x 14, 6 cents	383.04	
6,840 cubic feet square timber for cap pieces, 12 x 12, 6 cents	410.40	
4,480 cubic feet square timber for securing ties 10 x 12, 5 cents	224.00	
55,000 feet plank, 2 inches thick, $15	825.00	
3,876 cords of stone, delivered in the piers $3	13,566.00	
Collecting and putting brush in 114 piers, $5	570.00	
		18,902.52

[fol. 1268] Workmanship:

1 superintendent, 720 days, at $3	$2,160.00	
1 chief carpenter, 720 days, $2.50	1,800.00	
4 carpenters, 24 months each, 96 months, $30	2,880.00	
15 laborers, 24 months each, 360 months, $18	6,480.00	
		13,320.00

Iron work and tools:		
15,000 pounds iron for bolts, complete 15 cents	2,250.00	
4,560 pounds spikes, 10 cents	456.00	
Tools for carpenters and laborers	200.00	
		2,906.00
Cost of dyke		35,128.52

West Pier

Materials:		
1,056 logs of timber, 30 feet long, 14 inches diameter, at 75 cts	792.00	
1,120 tie pieces, 16 feet long, 9 inches diameter, 24 cts	268.80	
180 white oak piles, 25 feet long, 12 inches diameter, 75 cts	135.00	
99 securing ties, 18 feet long, 10 inches diameter, 36 cts	35.64	
1,980 cubic feet square oak timber for cap pieces, 12 x 12 inches, 6 cts	118.80	
1,485 cords of stone, delivered in the piers, $3.50	5,197.50	
14,000 feet plank two inches thick, $15	210.00	
Collecting and putting brush in 33 piers $5	165.00	
		6,922.74
Workmanship:		
1 superintendent, 360 days, at $3	1,080.00	
1 chief carpenter, 360 days, at $2.50	900.00	
4 carpenters, 12 months each, 48 months, $30	1,440.00	
15 laborers, 12 months each, 180 months, $18	3,240.00	
		6,660.00
Iron and tools:		
5,000 pounds iron for bolts, pile bands, &c. 15 cts	750.00	
990 pounds spikes for planking, 10 cts	99.00	
Tools for carpenters and laborers	100.00	
		949.00
Cost of west pier		$14,531.74

[fol. 1269] East Pier

East pier cost the same as west pier		$14,531.74
Machinery:		
1 pile driver, complete	500.00	
2 crane scows, each $200	400.00	
1 open do	100.00	
2 skiffs, each $25	50.00	
Blocks and cordage	150.00	
Cost of machinery		1,200.00

Recapitulation

Cost of dyke	$35,128.52
do west pier	14,531.74
do east pier	14,531.74
do machinery	1,200.00
Add 10 per cent for contingencies	6,539.20
Total cost of work	$71,931.20

Remarks.—The time estimated in workmanship are six seasons of eight months each, viz: three seasons to complete the dyke, and three seasons to complete the two piers.

No. 10

Estimate of the Probable cost of Two Piers for Removing the Obstructions at the Mouth of Big Sandy Creek, Emptying into Mexico Bay, on Lake Ontario, in the State of New York

Dimensions and Extent

North pier, length	....	530 yards
breadth	14 feet	
average depth from top to bottom	10 feet	
South pier, the same dimensions and extent as the north pier	....	530
Total length of work		1,060 yards

[fol. 1270] North Pier

Materials:		
1,484 logs timber, 30 feet long, 14 inches diameter at small end, at 75 cents.....	$1,113.00	
1,590 tie pieces, 16 feet long, 24 cents...	381.60	
318 white oak piles, 25 feet long, 12 inches diameter, 75 cents.....	238.50	
159 securing ties, 18 feet long, 10 inches diameter, 36 cents.....	57.24	
3,180 cubic feet oak timber, 12 x 12 inches diameter, 6 cents.....	190.80	
1,060 cords stone delivered in the piers, $3	3,180.00	
24,000 feet 2 inch plank, $15.....	360.00	
Collecting and putting in brush in 53 piers, $5.....	265.00	
		5,786.14
Workmanship:		
1 superintendent, 480 days, at $3.....	1,440.00	
1 chief carpenter, 480 days, $2.50.....	1,200.00	
4 carpenters, 16 months each, 64 months, $30	1,920.00	
15 laborers, 16 months each, 240 months, $18	4,320.00	
		8,880.00
Iron and tools:		
7,000 lbs. iron for bolts and pile bands, complete, at 15 cents.....	1,050.00	
1,590 lbs. spikes for planking, 10 cents..	159.00	
Tools for carpentry and laborers.....	100.00	
		1,309.00
Cost of north pier.....		15,975.14
Cost of south pier the same as north pier.....		15,975.14
		31,950.28
Machinery:		
1 pile driver complete.....	500.00	
2 crane scows, each $200.....	400.00	
1 open scow.....	100.00	
2 skiffs, each $25.....	50.00	
Blocks and cordage.....	150.00	
Cost of machinery.....		1,200.00
		33,150.28
Add 10 per cent for contingencies.....		3,315.02
Total cost of work.....		$36,465.30

Remark.—The time estimated in wor-manship for constructing the two piers, are four seasons of eight months each.

[fol. 1271] No. 11

Estimate of the Probable Cost of Two Piers, for Removing the Obstructions at the Mouth of Little Sodus Bay, on Lake Ontario, in the State of New York, as also for a Dyke to Close its Eastern Outlet

Dimensions and Extent

West pier, length	....	290 yards
breadth	14 feet	
average depth from top to bottom	16 "	
East pier, dimensions same as west pier	....	290
Dyke, a row of contiguous piles, length	....	130
		710 yards

West Pier

Materials:

928 logs of timber, 30 feet long, 14 inches diameter at the small end, at 75 cents	$696.00	
986 tie pieces 16 feet long, 9 inches diameter, 24 cents	236.64	
174 white oak piles, 25 feet long, 12 inches diameter, 75 cents	130.50	
87 securing ties, 18 feet long, 10 inches diameter, 36 cents	31.32	
1,740 cubic feet square timber for cap pieces, 12 x 12, 6 cents	104.40	
1,305 cords of stone delivered in the piers, $3.50	4,567.50	
13,000 feet of plank, 2 inches thick, $15	195.00	
Collecting and putting brush in 29 piers, $5	145.00	
		6,106.36

Workmanship:

1 superintendent, 360 days, $3	1,080.00	
1 chief carpenter, 360 days, $2.50	900.00	
4 carpenters, 12 months each, 48 months, $30	1,440.00	
15 laborers, 12 months each, 180 months, $18	3,240.00	
		6,660.00

Iron and tools:

5,000 lbs. iron for bolts, bands, &c. complete, at 15 cents	750.00	
870 lbs. spikes, 10 cents	87.00	
Tools for carpenters and laborers	100.00	
		937.00
Cost of west pier		$13,703.36

[fol. 1272] East Pier

East pier, cost the same as west pier		$13,703.36
Dyke		
390 white oal piles, driven close together, including driving, $2		780.00
Machinery:		
1 pile driving scow, complete	500.00	
2 crane scows, each at $200	400.00	
1 open scow	100.00	
2 skiffs $25	50.00	
Blocks and cordage	150.00	
Cost of machinery		1,200.00

Recapitulation

Cost of west pier	$13,703.36
Cost of east pier	13,703.36
Cost of dyke	780.00
Cost of machinery	1,200.00
	29,388.72
Add 10 per cent for contingencies	2,938.87
	$32,327.59

Remark.—The time estimated in workmanship are three seasons of eight months each, for the whole work.

No. 12

Estimate of the Probable Cost of Two Breakwaters, for Securing Pulteneyville Bay, on Lake Ontario, in the State of New York

Dimensions and Extent

West breakwater, length		300 yards
Do. breadth	18 feet	
Average depth from top to bottom	14	
Northeast breakwater, length		250
Do. do. breadth	14 feet	
Average depth from top to bottom	18	
Total length of work		550 yards

[fol. 1273] West Breakwater, Laid on Pebbly Bottom

Materials:

340 logs timber, 30 feet long, 14 inches diameter at small end, each at 75 cents.	$630.00	
900 tie pieces, 18 feet long, 9 inches diameter, 30 cents	270.00	
3,360 cubic feet square timber, 14x14, for sills, 6 cents	201.60	
1,680 cubic feet square timber, 14x14, for posts, 6 cents	100.80	
1,800 cubic feet square timber, 12x12, for cap pieces, 6 cents	108.00	
1,200 cubic feet square timber, 10x12, for securing ties, 5 cents	60.00	
1,560 cords of stone, delivered in the piers, $3	4,680.00	
Collecting and putting in brush in 30 piers, $5	150.00	
15,000 feet of plank, 2 inches thick, $15	225.00	
		6,425.40

Workmanship:

1 superintendent, 360 days, $3	1,080.00	
1 chief carpenter, 360 days, $2	900.00	
4 carpenters, 12 months each, 48 months, $30	1,440.00	
15 laborers, 12 months each, 180 months, $18	3,240.00	
		6,660.00

Iron and tools:

5,000 lbs. iron for bolts, complete, 15 cents.	750.00	
900 lbs. spikes for planking, 10 cents	90.00	
Tools for carpenters and laborers	100.00	
		940.00
Cost of west breakwater		$14,025.40

Northeast Breakwater, Laid on Sand and Clay

Materials:

900 logs timber, 30 feet long, 14 inches diameter at the small end, each at 75 cents	675.00	
950 tie pieces, 16 feet long, 9 inches diameter, 24 cents	228.00	
150 white oak piles, 25 feet long, 12 inches diameter, 75 cents	112.50	
[fol. 1274] 75 securing ties, 18 feet long, 10 inches diameter, 36 cents	27.00	
1,500 feet (cubic) of square timber, 12 x 12 inches, for cap pieces, 6 cents	90.00	
1,250 cords stone delivered in the piers, $3	3,750.00	
18,000 feet 2 inch plank, $15	270.00	
Collecting and putting brush in 25 piers, $5	125.00	
		5,277.50

Workmanship:

1 superintendent, 360 days, at $3	1,080.00	
1 chief carpenter, 360 days, $2.50	900.00	
4 carpenters, 12 months each 48 months, $30	1,440.00	
15 laborers, 12 months each, 180 months, $18	3,240.00	
		6,660.00

Iron and tools:

5,000 lbs. iron for bolts and pile bands complete, 15 cents	750.00	
750 lbs. spikes for planking, 10 cents	75.00	
Tools for carpenters and laborers	100.00	
		925.00
Cost of northeast breakwater		12,862.50

Machinery:

1 pile driver complete	500.00	
2 crane scows, each at $2	400.00	
1 open scow	100.00	
2 skiffs, $25	50.00	
Blocks and cordage	150.00	
Cost of machinery		1,200.00

Recapitulation

Cost of west breakwater	$14,025.40
Cost of northeast breakwater	12,862.50
Cost of machinery	1,200.00
	28,087.90
Add 10 per cent for contingencies	2,808.79
Total cost of work	$30,896.69

Remark.—The time estimated in workmanship, are three seasons of eight months each for the whole work.

[fol. 1275] No. 13

Estimate of the Probable Cost of a Pier Head and Mole, to Secure the Works Forming Oswego Harbor, on Lake Ontario, in the State of New York

Dimensions and Extent

Pier head, length	120 feet.
Do. breadth	30 "
Do. depth from top to bottom	30 "
Mole, length	1,130 "
Average width	64 "
Average depth	16 "

$64 \times 16 \div 2 \times 1130 \div 128 = 5360$ cords

Pier Head

240 logs timber, 30 feet long, 14 inches diameter at small end, 75 cents	$180.00	
360 tie pieces, 30 feet long, 12 inches diameter, at small end, 60 cents	216.00	
448 cubic feet of square timber, 14 x 14 inches, for sills, 6 cents	26.88	
480 cubic feet of square timber, 14 x 14 inches for sills, 6 cents	28.80	
256 cubic feet of square timber, 10 x 12, for securing ties, 5 cents	12.80	
240 cubic feet of square timber, 12 x 12, for cap pieces, 6 cents	14.40	
844 cords stone delivered in the piers, $2	1,688.00	
3,600 feet 2½ inch plank, $15	54.00	
Brush in 4 piers, $5	20.00	
		2,240.88
1 superintendent, 90 days, $3	270.00	
1 chief carpenter, 90 days, $2.50	225.00	
4 carpenters, 3 months each, 12 months, $30	360.00	
10 laborers, 3 months each, 30 months, $18	540.00	
		1,395.00
		3,635.88

Add 10 per cent for contingencies.....	.....	363.58
Cost of pier head.....		$3,999.46

Mole

2,000 cords heavy stone, not less than 1,000 lbs. each, $3.....	6,000.00	
3,360 cords heavy stone, to weigh from 100 to 500 lbs., $2.....	6,720.00	
		12,720.00
[fol. 1276] 1 superintendent, 240 days, $3	$720.00	
1 measurer and receiver, 240 days, $2....	480.00	
		1,200.00
		13,920.00
Add 5 per cent for contingencies.....	.....	696.00
Cost of mole.....	.....	14,616.00
Cost of pier head.....	.....	3,999.46
Cost of mole.....	.....	14,616.00
Total cost of work.....	.....	$18,615.46

No. 14

Statistical Table, Exhibiting the Population of the Several Counties in the State of New York, Which Will be Immediately Benefitted by the Contemplated Improvements on the South Shore of Lake Ontario, as per Enumeration of 1820

No.	Counties	Area in square miles	Population	Remarks
1	Monroe	600	26,529	By uniting the Genesee and Alleghany rivers.
2	Genesee	1280	39,835	
3	Livingston	460	19,196	
4	Alleghany	1120	9,330	
5	Cattaraugus	1292	4,090	
6	Wayne	508	20,310	By uniting Big Sodus Bay with the Susquehannah.
7	Ontario	634	35,312	
8	Seneca	426	17,773	
9	Cayuga	545	38,897	
10	Yates	232	11,025	
11	Tompkins	468	23,178	
12	Steuben	1600	21,989	
13	Tioga	1000	14,716	
14	Oswego	900	12,374	From Oswego to the Hudson, a water communication is opened.
15	Onondaga	522	41,467	
16	Oneida	1136	50,997	
17	Madison	616	32,208	
18	Herkimer	1290	31,017	
19	Montgomery	1000	37,569	
20	Schenectady	180	13,081	
21	Albany	462	38,113	
22	Jefferson	937½	32,952	By improving Big Sandy Creek.
23	Lewis	1008	9,227	
		18216½	584,188	

Remarks.—The population of the above counties has considerably increased since 1820.

[fol. 1277] No. 15

Geological Remarks

District	Features	Formation & soil	Minerals, &c.
Northern or Lake.	Level, or moderately uneven.	Alluvial, sandy, loam and lime.	Iron ore, salt, gypsum.

Thomas W. Maurice, Capt. of Engineers.

Erie, Penn., January 22, 1829.

[fol. 1278] DEFENDANTS' EXHIBIT 36

Harbor Improvements

The banks and shores of navigable waters, whether sea, lake, or river, in any of the States, belong either to the State or to individuals as the case may be, and not to the United States.

When by act of Congress a pier or breakwater is constructed for the improvement of a harbor, no right to the land on which it is constructed accrues to the United States by that fact alone, and without purchase and cession from the State.

If, in consequence of any such construction, land is made by accretion, such accretion belongs to the owner of the land to which it attaches, and not to the United States.

Attorney General's Office, July 3, 1855.

SIR: In a letter of the 16th of December last, you referred to me "a communication from the Colonel of Topographical Engineers, enclosing sundry reports and maps, relating to alleged trespasses on the land, and use of stone belonging to the Government, at the mouth of Genesee river, in New York," and requested my opinion and advice as to the proper course to be pursued to protect the property and interests of the United States.

Upon looking into those reports and maps, it appears that the village of Charlotte, in the State of New York, was long since laid out by the proprietor of the land, on the margins of Lake Ontario and of the river Genesee, on the west side of the river; with a street, called Main street or Broadway, extending southwardly from the margin of the lake. On the east side of Main street were nine lots, numbered from 21 to 29, inclusive, containing about four acres each, bounded on the west by Main street, on the north and south by right lines drawn at right angles to Main street and extending eastwardly to the lake, or to the river, according to locality. Lot No. 21 extended from Main street eastwardly to the lake. No. 22 extended from Main street eastwardly to the river, at its junction with the lake. All these lots, except 28 and 29, included a portion of marsh next to the river or the lake.

Congress made appropriations of money in successive years, beginning with 1828, and thence to 1838 inclusive,—first, for survey [fol. 1279] of Genesse river and harbor, and afterwards for "improving the navigation" of that river; twice for "completing the works" there, and twice for "continuing" them; in 1844, for "removing obstructions at the mouth of the Genesee river;" in 1852, for "continuing the removal of obstructions in the harbor at the mouth of the Genesee river;" and in 1853, for "improvement of the Genesee river." (iv Stat. at Large, p. 289; Ibid. p. 347; Ibid. p. 395; Ibid. p. 459; Ibid. p. 552; Ibid. p. 648; Ibid. p. 703; Ibid. p. 754; v Stat. at Large, p. 68; Ibid. p. 188; Ibid. p. 268; Ibid. p. 661; x Stat. at Large, p. 59; Ibid. p. 184.)

Here all the appropriations on the subject stop; and there is not in the whole series any appropriation for the purchase of land at

the mouth of this river; and no such purchase could be made without authority of Congress. (Act of May 1st, 1820, iii Stat. at Large, p. 568.)

In virtue of the appropriations above cited, however, but without obtaining any title to the land, or any cession of jurisdiction from the State of New York, the executive officers of the United States have caused a pier or wall to be built on the shore of the river Genesee, near its mouth, extending along the eastern boundary of lots No. 21 and 22, in the village of Charlotte, and into Lake Ontario. The intention was to finish this pier by cappings of very large stones. With this intent a number of such stones, cut and prepared in part, were brought from quarries on the river St. Lawrence to the Genesee river. The pier not being in forwardness to receive the cappings, these stones were landed, some on lot No. 22, and some on other lots in the village of Charlotte.

The pier or wall has not been finished, and there large stones, intended for the cappings, and so landed on private property, have been suffered to remain there for many years.

In consequence of the building of this pier, part of lot No. 22, originally marsh or covered with water, has become dry land, by gradual alluvial formations and accretions, or by recess of the waters of the Genesee river and of Lake Ontario,—the margin of the water of the lake having retired considerably from its former [fol. 1280] water-mark on the shore at the village Charlotte.

In the year 1848, this lot, No. 22, was the property of Josiah P. Williams, who, by deed of July, 1848, conveyed the title to Samuel Philips, as containing four acres more or less, "subject to the rights of the United States Government of and into any property they may have lying or being thereon, with the privilege of removing the same." Philips conveyed in like manner to John Farnham, who, by written agreement, sold to Phineas B. Cook, who, by written agreement of September, 1852, sold to Mr. Babcock, who, in December, 1853, sold to D. Davis, to whom Mr. Farnham has conveyed the legal title.

Mr. Phineas B. Cook presented to the War Department a claim against the United States for rents for the use and occupation of his property in lot No. 22, and also for damages and loss, sustained by him in the sale of his property, caused by the said encumbrances of stones. This claim caused the reference of the matter to Mr. Rice, agent of the United States, and his reports thereon of 28th January, and 10th March, 1854.

Subsequently, Mr. Davis presented his claim against the United States for use and occupation and damage of his property in lot No. 22, on which Colonel Turnbull reported on 26th October, 1854.

It now appears that Mr. Davis has commenced using these capping stones by breaking them and working them into the walls of his steam saw-mill, which he is erecting on lot No. 22, and on the east end of the lot, and he threatens to use stones of the pier in like manner; which acts of Mr. Davis are reported in Mr. Price's letter of 17th November, 1854,—in Colonel Turnbull's letter of 29th No-

vember, 1854, to the Chief of the Topographical Engineers,—and in Collector Campbell's letter of 19th November, 1854, to the Secretary of the Treasury.

Your letter of the 28th ult., communicates additional facts.

By the report of Mr. Rice of the 18th ult., and the papers accompanying the same, it appears that Cook has procured an appraisement by two fence viewers of the damages alleged to be done to him by the stone lying in lot No. 22, and the fence viewers re- [fol 1281] port the same at the sum of $830; that said Cook pretends to have distrained 120 cords of stone to pay this damage, and has advertised the stone for sale on the 16th of the present July, unless they be removed and the damages paid before the day of sale.

These documents estimate the rent and damage, due the proprietor of the land on which the stone lies, at various rates, from $7 to $40 per annum.

Said Cook never held the legal title to lot No. 22, but he may have been in possession during the interval between September, 1852, the date of his contract of purchase from Farnham, and December, 1851, that of his sale to Babcock.

These acts so begun and threatened to be continued by Mr. Cook and Mr. Davis, of lot No. 22, as reported by Mr. Rice, by Collector Campbell, and by Colonel Turnbull, are the injuries to the United States alleged to have been committed, or contemplated, and concerning which my opinion is requested.

I remark, first, on the supposed title of the United States to this land, which is presumed by Collector Campbell and by Colonel Turnbull, on the ground of the land being accretion consequent on the construction of the pier.

The misfortune is, that, in so far as appears, the United States had not any right or title to the shore of Lake Ontario or its bed, or to the shore or bed or banks of the Genesee river at lot No. 22, in the village of Charlotte; either by prerogative right, or by purchase from any individual, or by cession from the State of New York.

The shores and beds of navigable waters, within a State, where not held by individuals, are the property of the State, not of the United States. (Pollard's Lessee v. Hagan, iii Howard, 230; Goodlike on demise of Pollard's Heirs v. Kible, ix Howard, 477; Doe on demise of Kennedy's Ex. v. Beebe and others, xiii Howard, 25.)

The only right, which the United States have to any land in the village of Charlotte, is that in the lot No. 28, on which the lighthouse is erected. This property is held by purchase from the proprietor and by cession of jurisdiction from the State.

Not owning the land on which the pier is placed, the United [fol. 1282] States do not own the accretions to it; for the property of the accretion follows that of the previous main land.

The Supreme Court say, in a leading case:

"The principle is well settled that the person whose land is bounded by a stream of water, which changes its course gradually

by alluvial formation, shall still hold by the same boundary including the accumulated soil. No other rule can be applied on just principles. Every proprietor, whose land is thus bounded, is subject to loss by the same means which may add to his property; and as he is without remedy for his loss this way, he cannot be held accountable for his gain.

"This rule is no less just when applied to public than to private rights." (New Orleans v. United States, x Peters, 717; Black. Com. vol. ii, p. 261.)

It is wholly immaterial what may have been the immediate cause of the accretion, whether works voluntarily constructed by the Government, or a ship accidentally wrecked on the spot. The latter fact would be just as much a source of title as the former; that is, neither fact would afford a shadow of title, either to the land on which a pier has been put voluntarily, but inconsiderately, or to that on which the wreck may have been cast involuntarily; or to the accretion which either object might contribute to produce.

The United States, not having any right of property in the bed, shore, or banks of the river Genesee, or Lake Ontario, at lot No. 22, in the village of Charlotte, have no foundation for a claim to land made there by alluvial formations or by the recess of the waters.

The United States have no property there to be affected by the gradual change in the margin of the waters of the Genesee river and Lake Ontario; nothing to be added to by alluvion, nothing to be lessened by abrasion. They did not acquire a right to land, submerged or not submerged, by building the pier upon the property of an individual or of the State.

Secondly, a few words as to the pier itself. Supposing it to be in fact, as it was intended to be, an improvement to the navigation of the river, or of the harbor where it debouches into Lake Ontario, [fol. 1283] and so no nuisance,—although the United States have not the right of property in this pier, yet they may probably have a right of conservation, a right to prevent Mr. Davis or his co-owners from pulling down this pier, if thereby the navigation of the river Genesee, or the harbor at its mouth, would be injured, rendered more difficult, or less convenient and safe.

This conservative power to prevent nuisances to free and safe navigation, to preserve that which is existing, and safe and convenient, from destruction or damage, in so far as it exists, is a passive, not an active power, and raises no implication of power for the making of such improvements by Congress.

This point has already been discussed by me in an opinion of the 19th of October, 1853, addressed to you in relation to the power and means of preventing injury to the harbor of Waukegan, in the State of Illinois; to which reference is made respecting the power and the means for protecting the pier at the entrance of Genesee River, and the harbor at its mouth, from damage, if circumstances shall render it necessary and proper to call into activity the power of the Federal Government in the premises. (Ante, vol. vi, p. 172.)

In the third place, as to the capping stones remaining on lot No. 22, the United States are bound in law either to remove the stones, or

to make payment to the owner of the land, in the nature of rent or of indemnity for the encumbrance. But the non-removal of the stones by the United States, does not pass the title therein to Cook or Davis, or authorize them to destroy or to use the same.

The deed from Williams to Philips proves that the stone was not tortiously, but lawfully, placed on the land by the Government. If any rent was agreed between the parties, that agreement will determine the rate of compensation; if otherwise, the owner is entitled to a reasonable rate of compensation.

The proceedings under the valuation by the fence viewers, indicated by the printed notice, are not authorized by the statutes of New York, which confines this remedy to estrays, (1 R. L. pp. 660, 661,) and does not apply to inanimate things, or to cases where the property was placed upon the land by consent, or its owner is [fol. 1284] known. All these proceedings are a nullity, therefore, and a mere contrivance to defraud the United States.

Ample remedy exists to prevent the contrivance and completion of the unlawful acts, perpetrated or attempted by Cook and Davis.

I recommend that the papers, or copies of them, be placed in the hands of the District Attorney of the United States for the Northern District of New York, or some other competent attorney, with instructions to file separate bills of complaint immediately, in the name of the United States, against Cook and Davis; with prayer of injunction, in the former case, to prevent the proposed sale of the stone, and, in the latter, to prevent its use or destruction.

I presume that process will bring on a settlement of the question between the United States and the proprietor of the land, who, undoubtedly, will have good cause of dissatisfaction, if he be not, in some way, relieved of encumbrance or indemnified by the Government in the premises.

I am, very respectfully,

C. Cushing.

Hon. Jefferson Davis, Secretary of War.

Territorial Roads

The United States cannot take private land for the construction of a road in one of the Territories, without some legal form of expropriation either by act of Congress or of the Territory.

Attorney General's Office,
July 7, 1855.

SIR: Your communication of the 28th ultimo, and the documents accompanying the same, present the following case:

The act of Congress of July 18th, 1850, entitled "An act for the construction of certain roads in the Territory of Minnesota, and for other purposes," enacts "that the following sums are hereby appropriated for the construction of roads in the Territory of Minnesota, to wit: (among others) for the con-

[There is a break in the copy at this point.—PRINTER.]

[fol. 1285] DEFENDANTS' EXHIBIT 39

This indenture made the eighteenth day of November in the year of our Lord one thousand seven hundred and ninety between Nathaniel Gorham of Charlestown in the State of Massachusetts Esquire and Rebecca his wife, and Oliver Phelps of the State of Connecticut Esquire and Mary his wife of the one part, and Robert Morris of the city of Philadephia Esquire of the other part.

Whereas in and by an Act of the Legislature of the Commonwealth of Massachusetts, one of the United States of North America in General Court assembled passed in the House of Representatives and signed by the Honorable Theodore Sedgwick Esquire their Speaker on the twenty first day of November in the year of our Lord one thousand seven hundred and eighty eight and passed in the Senate and signed by the Honorable Samuel Philips the younger their President on the twenty eighth day of the same month, and approved by His Excellency John Hancock Esquire Governor of the said Commonwealth, it is recited that "Whereas the Legislature of this Commonwealth by their Resolve of the first of April last, did agree to grant sell and convey to the said Nathaniel Gorham and Oliver Phelps all the right title and demand which the said Commonwealth has in, and unto the said lands ceded by the State of New York to the said Commonwealth by Deed executed by their respective Commissione- at Hartford the sixteenth day of December in the year of our Lord one thousand seven hundred and eighty-six upon the Conditions in the said Resolve expressed.

And whereas the said Nathaniel Gorham and Oliver Phelps have on their part performed the said Agreement and complied with the conditions of the said resolve. And whereas the said Nathaniel Gorham and Oliver Phelps by virtue of Authority derived from the aforesaid Resolve have by Deed from the Sachems, Chiefs and Warriors of the five Nations of Indians, bearing date the eighth day of July last, purchased the claims of the native Indians to the fee or [fol. 1286] right of Soil in part only of the said lands, as contained within the descriptions of the said Deed.—hereafter inserted, which purchase appears to have been made under the Superintendancy prescribed and in the manner intended by the aforesaid resolve—Wherefore it was Enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same that there be and hereby is granted and confirmed unto Nathaniel Gorham of Charlestown in the County of Middlesex Esquire, and Oliver Phelps of Granville in the County of Hampshier Esquire their Heirs and assigns all the right, title, claim and demand which this Commonwealth has in and to the following Tract of Land, to wit, Begin-ing on the North Boundary Line of the State of Pennsylvania in the parallel of forty two degrees north Latitude, at a point distant eighty two miles West from the North East Corner of Pennsylvania on Delaware River as the said boundary line has been run and marked by the Commissioners of the States of New York and Pennsylvania respectively and from the said point or place of beginning

running West upon the said line to a Meridian which will pass through that corner or point of Land made by the Confluence of the Kanahasgwaicon Creek with the Waters of the Genisee River, thence North along the said Meridian to the Corner or point last mentioned, thence Northwardly along the Waters of the said Genesee River to a point two miles North of Kanawageras Village, so called, thence running in a direction due West twelve miles, thence running in a direction Northwardly so as to be twelve miles distant from the most westward bounds of the said Genesee River to the Shore of the Ontario Lake, thence Eastwardly along the Shores of the said Lake to a Meridian which will pass through the first point or place of beginning aforementioned, thence South along the said Meridian to the first point or place of beginning aforesaid, being such part of the whole [fol. 1287] Tract purchased by the Grantees as aforesaid, as they obtained a Release of from the natives, together with all the Appurtenances to the afore described Tract belonging. To have and to hold the same to them the said Nathaniel Gorham and Oliver Phelps their Heirs and Assigns forever as Tenants In Common, and not as joint Tenants. By Force whereof the said Nathaniel Gorham and Oliver Phelps became seised of the said Tract of Country in their demesne as of Fee. And whereas the said Nathaniel Gorham and Oliver Phelps have caused the same Tract of Land to be divided unto divers Tracts or Townships of Lesser dimensions and as nearly in regular Ranges as the sides contained within oblique or irregular lines would admit, and have caused the corners and lines thereof to be marked as permanent bounds between them by numbers and notches cut in the corner and line Trees, that is to say, the first Range beginning at the eighty second mile Stone in the Pennsylvania line, and extending with the same, West six Miles, thence extending of the breadth of six miles North the whole distance to the Shore of Lake Ontario, which first Range is divided into Thirteen Tracts of six miles square each Tract and one Tract six miles East and West but of an irregular North Boundary on the Shore of Lake Ontario supposed to be about four miles North and South on an Average, which fourteen Tracts in a general draft of the whole to these presents annexed are marked with the numeral Figures from one to fourteen inclusive. The second Range situate next in order on the Pennsylvania Line, and containing in breadth East and West six miles, and extending North to Lake Ontario, is divided in like manner into thirteen square Tracts of six miles and one Tract of six miles East and West, and about four miles North and South on an average bounded on Lake Ontario, and which fourteen Tracts in the said annexed draft are marked in like manner with figures from one to fourteen inclusive.—The Third Range situate next [fol. 1288] in order on the Pennsylvania line and containing in breadth East and West six miles and extending North to Lake Ontario, is divided in like manner into thirteen square Tracts of six miles, and one Tract of six miles by about four miles North and South on an average, bounded on Lake Ontario, and which fourteen Tracts are in the said annexed draft marked in like manner with

figures from one to fourteen inclusive.—The fourth Range situate next in order on the Pennsylvania Line and containing in breadth East and West, the like distance of six miles and extending North to Lake Ontario is divided into twelve square Tracts of Six miles, and one tract of larger dimensions East and West, and extending six miles further North, and one other Tract of about four miles in depth North and South on the Shore of Lake Ontario, and which fourteen Tracts are in the said annexed draft marked in like manner with figures from one to fourteen inclusive. The fifth Range situate next in order on the Pennsylvania line, and containing in Breadth East and West six miles, and extending of that breadth North sixty miles at the end of which the breadth is increased by extending Westward into the next Range and thence by a line extending North Eastwardly being the eastwardly bounds of that part of the Seventh Range which diverges from a north line eastwardly to conform to the general course of the Genesee River, and narrowing the Tract in its progress Northward the distance of twelve miles where it bounds upon Tract number thirteen of the fourth Range, which said fifth Range is divided into ten Tracts of six miles square each Tract and two Tracts with oblique angles sides on the western Boundary, and in the said annexed draft are marked with the figures one to twelve inclusive. The sixth Range Situate next in order on the Pennsylvania line and containing in breadth East and West six miles and extending of that breadth North fifty four miles, where the breadth East and West is reduced by the said oblique line diverging towards the East, and thence ex-[fol. 1289] tending in length North six miles further, which Sixth Range is divided into nine Tracts of six miles square each Tract and one Tract with an oblique angled side for its western Boundary, Which Tracts in the said draft are marked number one to ten inclusive. And the Seventh Range is situate next and last in order on the Pennsylvania line, containing in bread- East and West six miles, and extending of that breadth North fifty four miles to a point of the Genesee River, from whence the general Course of the said River diverges to the Eastwar- of a North Line, and carries the said seventh Range nearly paral-el with the said North Eastwardly course to Lake Ontario, and the said seventh Range is divided into nine Tracts of six miles square each Tract, and five Tracts of irregular unequal sides and oblique angles, and which Tracts in the said draft are marked with figures number one to fourteen inclusive. And the remainder of the said great Tract situate on the North Westwardly side of the said Genesee River has been divided into ten smaller Tracts in the annexed draft marked with the Letter A. number one, two, three and four, with the Letter B. number one, two, three and four, and with the Letter C. number one and two—but a maniest error has been committed in the laying out and dividing the same so that a new Survey thereof must be had in order to correct the said Error. And whereas the said Nathaniel Gorham and Oliver Phelps have previous to this present contract sold and conveyed to divers persons divers of the said Tracts of Land so as laid off and represented in the said annexed draft, to wit in the first Range the

Tract marked number two to Caleb Gardner and others, number six, seven, eight and nine to Caleb Benton, number ten to Chapin, Dickinson and others, number eleven to the said Oliver Phelps and others, number twelve to William Bacon and others, and number thirteen to Elijah Austin or George Joy his Assignee. In the second Range the [fol. 1290] Tract marked number one to Eleazer Linley, number two to Arthur Erwin number three to Prince Bryan, number five to John Shermerhorn and Hudson, number seven to Robinson and Hathaway, number eight to Arnold Potter, number nine to Caleb Benton, number ten and eleven to Israel Chapin, and number twelve to Jenkins and Swift; In the third Range number two to John Ross, number six to Elijay Austin or George Joy his Assignee, number eight to Potter and Bryan, number nine to the Reverend John Smith and Nathaniel Gorham junior, number ten is reserved by the said Nathaniel Gorham and Oliver Phelps for their own use, number eleven was sold to Comstock and others, and number twelve to Warner Comstock and others—In the fourth Range one equal third part of the Tract marked number six, is sold to Bonny, Stone and others, number seven to Watkins and others number eight to Prince Bryan or Welder his Assignee, number nine to the Reverend John Smith, number ten to John Fellows, number eleven to Enos Boughton, number twelve to William Walker and number thirteen to Jonathan Fasset. In the fifth Range the Tract marked number nine to the Reverend John Smith, number ten to Marvin Curtis and others, Sixteen thousand five hundred Acres part of number eleven are sold to Samuel Franklin and William Wadsworth, and number twelve to Stone, Dodge and others. In the Sixth Range the Tract marked number nine is sold to John Fellows, and number ten to Abner Miles. In the Seventh Range, the Tract marked number six is sold to Jeremiah Wadsworth, number eight to Thomas Grant, number nine is reserved by the said Nathaniel Gorham and Oliver Phelps for their own use, number ten is sold to William Jedd and others, number eleven to Dennis and others, eight hundred Acres part of number twelve are sold to Ezekiel Scott, number thirteen is sold to Caleb Hyde, and number fourteen to Samuel Street. And of the Lands Situate on the Northwestwardly side of the Genesee River, three [fol. 1291] tracts are sold and conveyed by certain metes, bounds and descriptions to wit the Tract marked A number one Containing about twenty five thousand and eight Acres of Israel Chapin and Samuel Street. The Tract marked C. number one containing about twenty four thousand and thirty Acres to Ebenezer Hunt and others, and five equal undivided eighth parts of the tract marked C. number two on the Shore of Ontario, and containing in the whole about Twenty thousand Acres to Smith, Jones and others. And whereas the said Nathaniel Gorham for and in behalf of himself and the said Oliver Phelps by certain articles of agreement indented made between them of the one part, and the said Robert Morris of the other part bearing date and the tenth day of August last past, for the consideration therein mentioned, did covenant and agree to sell and convey in the manner therein mentioned all the said Tract of Land first herein

above described (excepting thereout what they had already sold as aforesaid, and excepting the said two tracts or townships herein above mentioned to be reserved for the use of the said Nathaniel Gorham and Oliver Phelps, Containing together about forty thousand Acres of Land, which the said Nathaniel Gorham and Oliver Phelps reserved for them selves as in and by the said Articles of agreement among other things fully appears.

Now this indenture witnesseth, that the said Nathaniel Gorham and Rebecca his wife and Oliver Phelps and Mary his wife and each of them in execution of the Articles of agreement aforesaid for an in consideration of the sum of five Mexican dollars to them in hand paid by the said Robert Morris at the time of the execution hereof, the receipt whereof is hereby acknowledged, and for divers other good Causes and Considerations them thereunto especially moving, Have and each and every of them Hath and by these presents do and doth grant, bargain, sell, alien, enfeoff release and [fol. 1292] confirm unto the said Robert Morris his Heirs and Assigns forever. All that the aforesaid Tract of Land Situate in the County of Ontario in the State of New York as the same in the said recited Act of Assembly of the Commonwealth of Massachusetts is or howsoever of right the same ought to be butted bounded and described, Containing by estimation about two Million and one hundred thousand Acres of land be the same more or less, excepting nevertheless and always reserving out of this Grant and conveyance all and every those Tracts or Townships and parts of or quantities of Acres in those Tracts or Townships, which are herein above mentioned to have been sold to all and every or any of the persons herein above named, and also excepting and reserving the said two Tracts or Townships herein above mentioned to be reserved by the said Nathaniel Gorham and Oliver Phelps for their own use, and also excepting two Townships or Tracts of six miles square each Tract sold and conveyed to Arthur Erwin and others by Deed dated sometime in the month of September last the numbers of which are not now remembered, be the Contents of the said sold and purchased Tracts or Townships what they may and howsoever they are or of right ought to be butted bounded and described. Together with all and singular the woods, ways, waters, water courses, Huntings, Fishings, Fowlings, rights, liberties, privileges, Immunities, Hereditaments and Appurtenances whatsoever to the same belonging, and the Reversions and Remainders Rents Issues and profits and the Deeds Evidences and Securities of the Title thereof. And all the Estate, right Title and Interest whatsoever of them the said Nathaniel Gorham and Rebecca his Wife and Oliver Phelps and Mary his Wife and of each and every of them of into and out of the Premises. To have and to hold all and singular the said granted premises with the appurtenances to the said Robert Morris his Heirs and assigns: To his and their proper Use benefit and behoof forever—And the [fol. 1293] said Nathaniel Gorham and Oliver Phelps each for himself seperately (and not jointly for each other) and for his Heirs Executors and Administrators do and doth covenant promise grant and agree to and with the said Robert Morris his Heirs and Assigns

in manner and form following that is to say That they or either of them have not sold or conveyed to any person or persons whatsoever any parts or portions of the said great Tract of land other than those herein above specified. And that the quantity of land contained within the bounds of the said great Tract not sold to others nor reserved or excepted out of this present grant does amount to at least One Million of Acres. And that they or either of them have not done or suffered any Act matter or thing whatsoever in Deed or in Law whereby the premises hereby granted or any part thereof may or can be charged or incumbered or the Title thereof in any manner be defeated or impeached. And that they the said Nathaniel Gorham and Oliver Phelps and their Heirs all and singular the premises hereby granted with the appurtenances and every part thereof to the said Robert Morris his Heirs and Assigns against themselves and their said Wives respectively and their and each of their Heirs and against all and every person and persons lawfully claiming by through from or under them, or any or either of them shall and will Warrant and forever defend.

In witness whereof the said parties have to these presents and to a Duplicate thereof of the same Tenor and date in-erchangeably set their hands and seals the day and year first above written.

We acknowledge to have received from Robert Morris in the above written Indenture named the full Consideration above mentioned.

Nathaniel Gorham (L. S.), Rebekah Gorham (L. S.), Oliver Phelps (L. S.), Mary Phelps (L. S.)

Sealed and delivered in presence of us, the word Mary being written on an erasure on the 2d 68th and 78th Lines and the word [fol. 1294] "Shore" on the 27th Line, and the words "and two Tracts" being interlined on the 38th Line hereof before the Execution hereof (by Nathaniel Gorham). James M. Hughes, Robt. Bogardus. Witness to the signature of Mrs. Rebekah Gorham, John Larkin-David Stearns, Witness- to the signatures of Oliver Phelps & Mary Phelps, David Tod, Ezekiel Rogers Hyde.

Whereas in the aforegoing Indenture certain Townships, parts of Townships and Tracts or parcels of Land are excepted out of the Tract of Land thereby granted to Robert Morris in the said Indenture named—

And whereas some of those Townships, parts of Townships and Tracts of land so excepted as aforesaid are mentioned to have been sold to *to* persons different from those to whom they have been conveyed owing to the Assignment of the original Contracts—and others of the said Townships parts of Townships and Tracts or parcels of Land, although actually sold have not been as yet conveyed to the purchasers thereof—Now therefore to obviate any dif-iculties which may arise in consequence of such Misrecitals I the said Robert Morris do hereby confess acknowledge and declare that the townships parts of townships and Tracts or parcels of Land excepted and reserved in and by the said Indenture shall be and they are hereby as fully and effectually excepted as if the names of the persons

to whom they were sold or the circumstances of their not being as yet conveyed had been fully truly and clearly expressed. And I do also confess acknowledge and declare, that before the delivery of these presents the said Nathaniel Gorham and Oliver Phelps have informed me, that they have sold and conveyed to Ezekiel Boughton [fol. 1295] the remainder of the Tract in the fifth Range marked No. eleven whereof Sixteen*th* Thousand five hundred Acres are in the above Indenture recited to be sold to Samuel Franklin and William Wadsworth, and they have received consideration and given Bond for the Com*v*eyance of twelve thousand five hundred Acres part of a Tract or Township in the Sixth Range the number of which is not now rememb-red to Edward Hutchinson Robins, Esquire. Now therefore I do for myself and my Heirs declare that the said Portions of the said two Tracts so as aforesaid sold and contracted to be sold to the said Ezekiel Boughton and Edward Hutchinson Robins respectively are and shall be as fully and to all intents and purposes excepted out of the above Grant as if the same were excepted in the body of the Deed and if thereto required will execute a release thereof to them their Heirs and Assigns forever.

In witness whereof I have hereunto set my hand and Seal the eleventh day of Decem-r in the year of our Lord one thousand seven hundred and ninety.

Robt. Morris. (L. S.)

Sealed and delivered in the presence of Miers Fisher, John Richards, Junr.

Be it remembered that on the twenty fourth day of May in the year of our Lord one thousand seven hundred and ninety one before me John Ray one of the Masters in Chancery for the State of New York personally appeared the Honorable Robert Morris who acknowledged he signed, sealed and delivered the preceeding Instrument as his voluntary Act and Deed for the uses and purposes therein mentioned, and I having perused the said Instrument and finding therein no material erasures or interlineations do allow the same to be recorded.

John Ray.

[fol. 1296] STATE OF NEW YORK, ss:

Be it remembered that before me James M. Hughes one of the Masters in Chancery personally came and appeared Nathaniel Gorham and Oliver Phelps Grantors within named and Rebekah Gorham Wife of the said Nathanial Gorham and Mary Phelps Wife of the said Oliver Phelps also within named, and the said Nathaniel Gorham and Oliver Phelps acknowledge that they duly executed the within Indenture as their voluntary Act and Deed for the uses and purposes therein mentioned, and the said Rebekah Gorham and Mary Phelps being severally by me examined privately and seperate and apart from their said Husbands—confessed severally that she executed a release of all her Estate Interest and Dower in the within premises without any Fear, Threat or Compulsion of

from or by her said Husband, and I having examined the same and finding no material Erasures or Interlineations therein except those noted to have been made before Execution thereof do allow the same to be Recorded.

James M. Hughes.

Recorded in the Secretary's Office of the State of New York in Book of Miscellaneous Records endorsed MRB page 169 &c &c.

Robt. Harper, D. Secr'y.

New York May 24th 1791.

I do hereby certify that the foregoing to be a true copy of the original, examined and compared with the same this 15 day of July 1791.

Nath. Gorham, Jr., Clk.

[fol. 1297] STATE OF NEW YORK,
County of Ontario, ss:

I, Howard D. Aldrich, Clerk of the County of Ontario, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared the annexed copy of Deed with the original recorded in this Office in Liber 1 of Deeds at page 153 and that the same is a correct transcript therefrom, and of the whole of said original.

I also certify that the annexed *may* is a photographic copy of the map following said deed; said map appearing at page 166 in Liber 1 of Deeds.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Canandaigua, N. Y., this 2nd day of November, 1923.

Howard D. Aldrich.

[fol. 1298] DEFENDANTS' EXHIBIT 46

(See p. 870 of Minutes)

Letters Patent from the People of the State of New York to Bartholomay Brewing Co.

Letters Patent

The People of the State of New York

to

The Bartholomay Brewing Co. of Rochester, N. Y.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, Greeting:

Know ye, That pursuant to a resolution of the Commissioners of our Land Office, for the purpose of promoting the Commerce of

our said State or for the beneficial enjoyment by the adjacent owner, and for no other object or purpose whatsoever, and with the reservations and upon the conditions hereinafter mentioned, We have given and granted, and by These Presents do give and grant unto The Bartholomay Brewing Co. of Rochester, N. Y., and assigns, the land under water, and between high and low-water mark, described as follows, to wit:

All that certain piece or parcel of land under the waters of Lake Ontario, in front of and adjacent to upland of the said Bartholomay Brewing Co., in the Village of Charlotte, in our County of Monroe, described as follows, to-wit: Beginning at a point where the west line of a street in said Village of Charlotte, known as Broadway, intersects the line of high water mark of the waters of Lake Ontario: running thence north twenty-six degrees and forty-nine minutes east along said west line of said Broadway and said line extended twelve hundred seventy feet; thence north sixty-two degrees and fifty eight minutes west four hundred ten feet to a point in the west line of a private street running from Beach Avenue to Lake Ontario, extended parallel with said west line of said Broadway said point being one hundred eighty feet easterly from the west line of lands owned by the Bartholomay Brewing Co. extended parallel with said west line of said Broadway: thence south twenty-six degrees and forty-nine minutes west along said west line extended of said private street, about twelve hundred seventy feet, to [fol. 1299] a point where the said westerly line of said street intersects the said line of high water mark; thence south sixty-two degrees and fifty-eight minutes east generally, but along said high water line as the same winds and turns to the place of beginning, containing about eleven and ninety five one-hundredths acres of land under water.

Also all that other certain piece or parcel of land under the waters of Lake Ontario, beginning at a point in the line of high water mark of the waters of Lake Ontario one hundred feet westerly from the west line of a private street, running from Beach Avenue to Lake Ontario, in the Village of Charlotte aforesaid, and running thence north twenty-six degrees and forty-nine minutes east twelve hundred seventy feet: thence north sixty two degrees and fifty eight minutes west eighty feet to a point in the west line of lands owned by the Bartholomay Brewing Co. extended parallel with the west line of a certain street called Broadway: thence south twenty-six degrees and forty nine minutes west along said west line and said west line extended about twelve hundred seventy feet to a point where the said westerly line of said lands intersects the said line of high water mark; thence south sixty-two degrees and fifty-eight minutes east generally, but along said high water line as the same winds and turns to the place of beginning.

Containing about two and thirty-three one hundredths acres of land under water.

These Letters Patent are issued pursuant to a Resolution of the Commissioners of the Land Office, adopted December 15, 1887, and October 25, 1888.

Excepting and Reserving to all and every the said People, the full and free right, liberty and privilege of entering upon and using all and every part of the above described premises, in as ample a manner as they might have done had this power and authority not been given, until the same shall have been actually appropriated [fol. 1300] and applied to the purposes of Commerce, by erecting a Dock or Docks thereon, or for the beneficial enjoyment of the same by the adjacent owner.

In Testimony Whereof, We have caused these our Letters to be made Patent, and the Great Seal of our said State to be hereunto affixed.

Witness David B. Hill Governor of our said State at our City of Albany, the Thirtieth day of October in the Year of our Lord one thousand eight hundred and eighty eight.

David B. Hill. (Seal.)

Passed the Secretary's Office the 30th day of October, 1888.
Diedrich Willers, Deputy Secretary of State.

STATE OF NEW YORK, ss:

Office of the Secretary of State

I hereby certify that the foregoing patent is issued pursuant to a resolution of the Commissioners of the Land Office, passed October 25th, 1888, and of record in Book No. 18 at page 599 of Land Office Minutes.

Witness my hand and the Seal of Office of the Secretary of State, at the City of Albany, this Thirtieth day of October, 1888.

Diedrich Willers, Deputy Secretary of State and Clerk of Land Com'rs. (Seal.)

[fol. 1300a] [Endorsed:] Copy. Letters patent. People of the State of New York to The Bartholomay Brewing Company. (A true Copy of the Original Recorded the 1st day of November, 1888, at 10:11 A. M. in Monroe County Clerk's Office in Liber 441 of Deeds at page 388.) Hubbell, Taylor, Goodwin and Moser, 31 Exchange Street, Rochester, N. Y.

[fol. 1301] DEFENDANTS' EXHIBIT 47

(See p. 870 of Minutes)

Deed from James M. Whitney and Wife to Bartholomay Brewing Co.

This indenture, made this 18th day of April in the year of our Lord one thousand eight hundred eighty-five between James M. Whitney and Martha L., his wife, of Rochester, Monroe County,

New York, of the first part, and The Bartholomay Brewing Company of the second part: Witnesseth

That the said parties of the first part, in consideration of the sum of Twenty Three thousand seven hundred and fifty — ($23,750.00) to them duly paid, have sold, and by these presents, do grant and convey to the said party of the second part, its successors and assigns all that Tract or Parcel of Land, situate in the Town of Greece County of Monroe and State of New York, being part of out lot number twenty (20) in the Village of Charlotte and bounded as follows; beginning at the intersection of the center line of Beach Avenue and the east line of said lot, and running thence north along said east line to Lake Ontario thence westerly along the shore of said Lake to a point two hundred and fifty (250) feet east of the west line of said lot, measured on a line at right angles to the same; thence south parallel with said east line to the center line of Beach Avenue; thence easterly along the center line of Beach Avenue to a point two hundred and thirty (230) feet west of the said east line, measured on a line at right angles to it; thence south parallel with said east line to a point one hundred and seventy five (175) feet north of the south line of said lot; thence east at right angles to said east line one hundred and thirty (130) feet; thence north parallel to said east line one hundred (100) feet; thence east at right angles to said east line to the same; thence north along said east line to the place of beginning. Reserving, however, a right of way over a private street or avenue thirty (30) feet wide, extending from Beach Avenue to the said Lake, along the west line of the lands herein conveyed. Also the said parties of the first part do [fol. 1302] hereby grant and convey the right of way over and the use and privilege of the beach of said Lake lying north of the lands heretofore conveyed to Charles E. Upton by deed dated February 22nd, 1873, and recorded in Monroe County Clerk's Office in Liber 262 of Deeds at page 375, in common with other owners of lots on said street or avenue and the owners of lots in the south west quarter of said lot twenty (20). The lands hereby conveyed are subject to a certain mortgage to secure $10.000.00 and interest thereon, executed by the parties of the first part to Asa T. Soule dated December 29th, 1882, and recorded in said Clerk's office; which mortgage and the interest thereon from the 17th day of April, 1885, the party of the second part assumes and agrees to pay.

With the appurtenances, and all the estate, title and interest therein of the said parties of the first part. And the said James M. Whitney does hereby covenant and agree, to and with the said party of the second part, its successors and assigns, that the premises thus conveyed, in the quiet and peaceable possession of the said party of the second part, its successors and assigns, he will forever Warrant and Defend, against any person whomsoever, lawfully claiming the same or any part thereof.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of

Jas. M. Whitney (L. S.), Martha L. Whitney (L. S.)

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 18th day of April in the year one thousand eight hundred eighty five, before me, the subscriber, personally appeared James M. [fol. 1303] Whitney and Martha L. Whitney his wife to me personally known to be the same persons described in, and who executed the within instrument, and severally acknowledged that they executed the same.

G. M. W. Bills, Com'r of Deeds.

[fol. 1303a] [Endorsed:] Copy. Warranty Deed. James M. Whitney and Martha L., his wife, to The Bartholomay Brewing Company. (A True Copy of the Original Recorded the 18th day of April, 1885, at 2:55 o'clock P. M. in Monroe County Clerk's office in Liber 390 of Deeds at p. 354.) Hubbell, Taylor, Goodwin and Moser, 31 Exchange Street, Rochester, N. Y.

[fol. 1304] DEFENDANT'S EXHIBIT 48

(See p. 871 of Minutes)

Deed from New York Central Railroad Co. to Bartholomay Brewing Co.

Bargain and Sale Deed

The New York Central Railroad

to

Bartholomay Brewing Company

This Indenture, made the 17th day of August, in the year One thousand nine hundred and fifteen, Between—The New York Central Railroad Company a corporation organized and existing under the laws of the State of New York, party of the first part, and the Bartholomay Brewery Company, a corporation organized and existing under the laws of the State of New York, having its residence (principal office) at 555 St. Paul Street, Rochester, New York, party of the second part.

Witnesseth: That the said party of the first part, in consideration of Six Hundred and Fifty Dollars ($650.00) lawful money of the United States, paid by the party of the second part the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, alien, remise, release, convey and confirm unto the said party of the second part, and to its successors and assigns forever.

All the undivided one-fourth interest of, in and to all that certain piece or parcel of land situate in the Village of Charlotte, Town

of Greece, County of Monroe, and State of New York, bounded and described as follows:

Beginning at a point in the west line of a private street or avenue thirty (30) feet wide, running from Beach Avenue northerly, parallel with, and two hundred and fifty (250) feet easterly from the west line of Original Lot 20, in the Village of Charlotte, said point of beginning being one hundred and thirteen (113) feet northerly from Beach Avenue.

And running thence westerly along the south line of lands described in the second descriptive clause in a deed from Oliver M. [fol. 1305] Benedict, as Referee, to James M. Backus, recorded in the office of the Clerk of said County, in Liber 329 of Deeds, at page 85, one hundred (100) feet, to land, now or formerly, of J. D. Husbands and others;

Thence northerly, parallel with the west line of said private street or avenue, seventy (70) feet;

Thence easterly, parallel with the south line of said lands described in the second descriptive clause in said deed from Oliver M. Benedict, as Referee, as aforesaid, one hundred (100) feet, to the west line of said private street or avenue;

Thence southerly along the west line of said private street or avenue, seventy (70) feet, to the place of beginning.

Containing seven thousand (7,000) square feet of land, more or less.

Together with all the right, title and interest of the party of the first part, of, in and to that portion of said private street or avenue, as lies in front of, adjacent to, and northerly of the easterly prolongation of the southerly line of, the above described premises.

Said above described premises being a part of the same premises that were conveyed by Cyrus Gatewood to Windsor Beach and Ontario Railroad Company by deed dated January 31, 1888, recorded in the Office of the Clerk of said County, in Liber 435 of Deeds, at page 8.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To Have and to Hold the above granted premises unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and this instrument to be signed by its President, the day and year first

The New York Central Railroad Company, by A. H. Smith, President. (Seal.)

[fol. 1306] Attest: D. W. Pardee, Secretary.

State of New York,
County of New York, ss:

On this 17th day of August, 1915, before me personally came Alfred H. Smith to me personally known, who being by me duly sworn, did depose and say: That he resides at Chappaqua, in the

County of Westchester and State of New York; that he is the President of The New York Central Railroad Company the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said corporation, and that he signed his name thereto as President of said corporation by the like authority.

J. F. Desmond, Notary Public, Westchester Co. N. Y. Certificate filed in New York County, Clerk's #110. Register #6021. My commission expires March 30, 1916. (Seal.)

No. 21883

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that J. F. Desmond whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written was, at the time of taking such deposition or proof and acknowledgement a Notary Public, acting in and for the said County, duly commissioned and sworn and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds or conveyances for land, tenements or hereditaments in said State of New York, that there is on file in the Clerk's Office of the County of [fol. 1307] New York, a certified copy of his appointment and qualification as Notary Public of the County of Westchester with his autograph signature. And further, that I am well acquainted with the handwriting of said Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 20 day of Aug., 1915.

Wm. F. Schneider, Clerk. (Seal.)

[fol. 1307a] [Endorsed:] Bargain and Sale Deed. The New York Central Railroad to Bartholomay Brewery Company. A true copy of the original received Aug. 30, 1915, at 9:56 A. M. in Monroe County Clerk's Office and recorded in Liber 968 of Deeds, at page 246.

[fol. 1308] DEFENDANTS' EXHIBIT 49

(See p. 871 of Minutes)

Deed from James M. Whitney and Wife to Warham Whitney

Warranty Deed

Jas. M. Whitney et al.

to

Warham Whitney

This Indenture made this First day of Oct. in the year of our Lord one thousand eight hundred and eighty-five. Between Jas. M. Whitney and Martha L. his wife, of the City of Rochester, New York, of the first part, and Warham Whitney, of the same place of the second part. Witnesseth, That the said part- of the first part, in consideration of the sum of Five thousand ($5,000) Dollars, to them duly paid, has sold and By these present do-s grant and convey to the said party of the second part, his heirs and assigns forever. All that tract or parcel of Land, situate in the village of Charlotte, County of Monroe and State of New York, being all that part of the original Village lot twenty and described as follows: beginning in the south line of said lot twenty at a point two hundred feet, west of the west line of a Street called Broadway, thence westerly along said south line to the southwest corner of said lot 20, thence northerly at right angles along the west line of said lot 20, one hundred and ten feet, thence easterly at right angles one hundred feet, thence northerly at right angles forty feet (40), thence easterly at right angles twenty-five feet, thence northerly at right angles one hundred (100) feet; thence easterly at right angles twenty five feet (25), thence northerly at right angles fifty feet (50), thence westerly at right angles twenty five feet (25), thence northerly at right angles about thirty six feet (36) to the northeast corner of land deeded one Manning, by deed recorded in Liber 288 at page 272; thence westerly at right angles twenty five feet to the southeast corner of land deeded one Woodland by deed recorded in Liber 268, at page 78 thence northerly parallel with the west line of lot 20, and one hundred & thirty feet (130 ft.) easterly therefrom & along said Wood-
[fol. 1309] land land to the south line of Beach Avenue, thence easterly along the south line of Beach Avenue to the west line of Land deeded Bartholomay Brewing Co. L. 390 P. 354, thence southerly along said line & parallel with the east line of said lot 20, to a point one hundred & seventy five (175) north of the south line of said lot 20, thence easterly at right angles to a point one hundred and twenty five feet (125) west of the west line of said Broadway thence southerly at right angles, fifty feet (50) thence *thence* westerly at right angles fifty feet (50) thence southerly at right angles fifty feet (50) thence westerly at right angles twenty five feet (25) thence

southerly at right angles seventy five feet (75) to place of beginning together with all land right in the Streets adjoining same & excepting therefrom a lot on the south side of Beach Av fifty feet wide and extending back same width about 125 ft. as Deed to Ann Blake by deed recorded in Liber — at page —. Also do grant and convey all that other part of Lot twenty and described as follows: beginning in west line of a private St. thirty feet wide (extending from Beach Av. to Lake Ontario) at a point two hundred & eighty three feet (283) northerly from the north line of Beach Av. (on the line of said Private St.) thence westerly at right angles to Private St. one hundred feet (100) thence northerly at right angles; to Lake Ontario, thence easterly along said Lake to the west line of said private St. thence southerly to place of beginning, together with the right of way over said Private St. reserving to party of first — and all others having grants, the right to use the shore of said Lake for boating, fishing, & bathing, subject to the payment of a mortgage on said premises, made by party-s first part, for two thousand Dollars & interest from Oct. 1st 1885.

With the Appurtenances, and all the estate, Title and interest therein of the said party of the first part. And the said Jas. M. Whitney does hereby covenant and agree to and with the said part- of the second part, his heirs and assigns, that the premises thus conveyed in the Quiet and Peaceable Possession of the said Party of the second part, his heirs and assigns, he will forever Warrant and De- [fol. 1310] fend against any person whomsoever lawfully claiming the same, or any part thereof.

In Witness Whereof, the party of the first part, has hereunto set their hands and seals the day and year first above written.

Sealed and Delivered in presence of —— ——.

Jas. M. Whitney (L. S.), Martha L. Whitney (L. S.).

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 14th day of October, in the year one thousand eight hundred and eighty five before me the subscriber, personally appeared James M. Whitney & Martha L. Whitney, to me known to be the same persons described in and who executed the within instrument and severally acknowledged that they executed the same.

H. B. Stevens, Com'r of Deeds for Rochester.

[fol. 1310a] [Endorsed:] Warranty Deed. Jas. M. Whitney et al. to Warham Whitney. A true copy of the original recorded in the Monroe County Clerk's Office October 17, 1885, at 11:50 A. M., in Liber 398 of Deeds, at page 309.

[fol. 1311] DEFENDANTS' EXHIBIT 50

(See p. 871 of Minutes)

Deed from James M. Whitney and Warham Whitney and Wife to Charles E. Burnham

Warranty Deed

James M. Whitney et al.

to

Charles G. Burnham

This Indenture, Made this first day of November in the year of our Lord One thousand Eight hundred and eighty Six, Between James M. Whitney and Martha L. his wife, Warham Whitney and Fanny his wife, all of the City of Rochester, Monroe County and State of New York of the first part, and Charles G. Burnham of the City and County of New York of the second part. Witnesseth, That the said parties of the first part, in consideration of the sum of three thousand dollars ($3,000.00) and the assumption of two mortgages as hereinafter stated to them duly paid, have sold and By these Presents, do grant and convey to the said party of the second part his heirs and assigns forever, All that tract or parcel of land situate in the town of Greece, County of Monroe and State of New York being a part of lot number twenty (20) bounded and described as follows: beginning in the south line of said lot twenty, two hundred feet (200 ft.) Westerly of the west line of Broadway, thence westerly along said south line of said lot twenty to the south-west corner of said lot twenty (20) thence northerly along the west line of said lot twenty One hundred and ten feet (110 ft.) thence Easterly at right angles to the west line of said lot One hundred and thirty feet (130 ft.) thence northerly at right angles forty feet (40 ft.) thence Easterly at right angles twenty five feet (25 ft.) thence northerly at right angles one hundred feet (100 ft.) thence easterly at right angles twenty five feet (25 ft.) thence northerly at right angles fifty feet (50 ft.) thence Westerly at right angles twenty five feet (25 ft.) thence northerly at right angles about thirty six feet (36 ft.) to the northeast corner of Manning's land; thence Westerly at right angles twenty five feet (25 ft.) to the south east corner of Woodlands land; thence northerly and parallel with the west line [fol. 1312] of said lot twenty (20) and One hundred and thirty feet (130 ft.) easterly therefrom and along said Woodlands land to the south line of Beach Avenue; thence easterly along the south line of Beach Avenue to the west line of the Bartholomay Brewing Company's land; thence southerly along said line and parallel with the east line of said lot twenty (20) to a point One hundred and seventy five feet (175 ft.) north of the south line of said lot twenty (20) thence easterly at right angles to a point One hundred and twenty five feet (125 ft.) west of the west line of Broadway; thence Southerly at right angles fifty feet (50 ft.) thence Westerly at right

angles fifty feet (50 ft.) thence southerly at right angles fifty feet (50 ft.) thence westerly at right angles twenty five feet (25 ft.); thence Southerly at right angles Seventy five feet (75 ft.) to the place of beginning. Excepting however and reserving therefrom a lot on the south side of Beach Avenue fifty feet (50 ft.) wide and about One hundred and twenty five feet (125 ft.) deep conveyed to Ann Blake by said James M. Whitney & wife by deed dated September 15th 1873, and recorded in Monroe County Clerk's Office in liber 268 of deeds at page 119. Said parties of the first part also hereby grant and convey to said party of the second part, all and singular all buildings, property and appurtenances upon the land hereby conveyed except the furniture in the cottages and except the so called roller coaster on said land. Including all right title and interest of the parties of the first part in and to said Beach Avenue and also to all other parts of said lot twenty (20) lying south of said Beach Avenue, and including also all right title and interest of the parties of the first part in and to a certain private Street or Avenue thirty feet wide and extending from Beach Avenue northerly to Lake Ontario along the west line of lands conveyed by said James M. Whitney & wife to the Bartholomay Brewing Company by deed dated April 18" 1885 & recorded in Monroe County Clerk's Office in liber 390 of deeds at page 354, and including also all right, title [fol. 1313] and interest of said parties of the first part in and to the beach of said Lake Ontario in front of said private Street or Avenue and a distance of One hundred feet westerly therefrom subject to any rights and privileges in & To said beach which said parties of the first part may have heretofore conveyed. Subject nevertheless to two certain mortgages upon said premises as follows: One made by said James M. Whitney to William Mudgett to secure the payment of two thousand dollars ($2,000) and the other made by said Warham Whitney to said James M. Whitney to secure the payment of five thousand dollars ($5,000) which said mortgages said party of the second part hereby assumes and agrees to pay with interest from November 1st 1886 as part of the consideration of this transfer.

With the Appurtenances, and all the Estate, Title and Interest of the said parties of the first part. And the said James M. Whitney and Warham Whitney do hereby covenant and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, they are the lawful owners and they are well seized, in fee simple, of the premises above described, free and clear from all lien, right of dower, or other incumbrance and that they have good right and full power to convey the same and that the premises thus conveyed in the Quiet and Peaceable Possession of the said party of the second part, his heirs and assigns they will forever Warrant and Defend against any person whomsoever lawfully claiming the same, or any part thereof.

In Witness Whereof, The parties of the first part, have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in the presence of.

J's M. Whitney (L. S.), Martha L. Whitney (L. S.), Warham Whitney (L. S.), Fanny Whitney (L. S.).

[fol. 1314] STATE OF NEW YORK,
County of Monroe, ss:

On this 15th day of November in the year One thousand eight hundred and eighty-six before me, the subscriber, personally appeared James M. Whitney, Martha L. Whitney, Warham Whitney & Fanny Whitney to be known to be the same persons described in an who executed the within instrument, and severally acknowledged that they executed the same.

H. S. Hanford Notary Public.

[fol. 1314a] [Endorsed:] Warranty Deed. James M. Whitney et al. to Charles G. Burnham. A true copy of the original recorded in Monroe County Clerk's Office January 4, 1887, at 11:35 A. M., in Liber 413 of Deeds, at page 365.

[fol. 1315] DEFENDANTS' EXHIBIT 51

(See pp. 871-872 of Minutes)

Deed from James M. Whitney and Wife to Charles E. Burnham

This indenture, Made this Eleventh day of November in the year of our Lord one thousand eight hundred and eighty-six between James M. Whitney and Martha L. Whitney his wife, both of Rochester, Monroe County, New York, parties of the first part, and Charles G. Burnham of New York party of the second part,

Witnesseth, That the said partys of the first part, in consideration of the sum of One Dollar ($1) to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have bargained, sold, remised and quit-claimed, and by These Presents, do bargain, sell, remise and quit-claim, unto the said party of the second part, and to his heirs and assigns forever; All that tract or parcel of land, situate in the Town of Greece, County of Monroe and State of New York, being a part of lot twenty (20) bounded and described as follows: Commencing in the west line of a private Street or Avenue, leading from Beach Avenue to Lake Ontario, at a point two hundred and eighty-three feet (283 ft.) northerly from the north line of Beach Avenue, thence westerly at right angles to the west line of said private Street one hundred feet (100 ft.) to lands, heretofore deeded, to J. D. Husbands, and others; thence northerly ten feet (10 ft.) more or less, to the waters of Lake Ontario; thence easterly and along the waters of Lake Ontario about one hundred feet (100 ft.) to the west line of said private Street; thence southerly along said west line of said private Street ten feet (10 ft.) more or less, to the place of beginning.

Together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and de-

mand whatsoever, of the said party of the first part, either in law or equity, of, in and to the above bargained Premises, with the said hereditaments and appurtenances, to Have and to Hold the said [fol. 1316] premises to the said party of the second part, his heirs and assigns, to the sole and only proper benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, The parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in presence of

Jas. M. Whitney (L. S.), Martha L. Whitney (L. S.).

STATE OF NEW YORK,
County of Monroe,
City of Rochester, ss:

On this 15th day of November in the year one thousand eight hundred and eighty-six before me, the subscriber, personally appeared James M. Whitney & Martha L. Whitney his wife to me known to be the same persons described in and who executed the within instrument and severally acknowledged that they executed the same;

H. S. Hanford, Notary Public.

[fol. 1316a] [Endorsed:] Quit-Claim Deed. James M. Whitney and Martha L. Whitney, his wife, to Charles G. Burnham. A true copy of the original recorded in Monroe County Clerk's Office January 4, 1887, at 11:35 A. M., in Liber 415 of Deeds, at page 94.

[fol. 1317] DEFENDANTS' EXHIBIT 52

(See p. 872 of Minutes)

Deed from New York State Realty and Terminal Company to Bartholomay Brewing Co.

Bargain and Sale Deed

New York State Realty and Terminal Company

to

Bartholomay Brewery Company

This indenture, Made the 17th day of August, in the Year One Thousand Nine Hundred and fifteen. Between New York State Realty and Terminal Company, a corporation organized and existing under the laws of the State of New York, party of the first part, and the Bartholomay Brewery Company, a corporation organized and existing under the laws of the State of New York, having its residence (principal office) at 555 St. Paul Street, Rochester, New York, party of the second part.

Witnesseth: That the said party of the first part in consideration of One hundred Dollars ($100), lawful money of the United States, paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to its successors and assigns forever.

All That Certain Piece or parcel of land situate in the Village of Charlotte, Town of Greece, County of Monroe, and State of New York, bounded and described as follows:

Commencing in the west line of the private street or avenue leading from Beach Avenue to Lake Ontario, at a point two hundred eighty-three (283) feet northerly from the north line of Beach Avenue;

Thence westerly, at right angles to the west line of said private street, one hundred (100) feet, to lands heretofore deeded by James M. Whitney to J. D. Husbands and others;

Thence northerly, at right angles to the last described course, about thirty-two (32) feet to the waters of Lake Ontario.

Thence easterly along the waters of Lake Ontario, about one hundred (100) feet to the west line of said private street, or such line [fol. 1318] produced;

Thence southerly along said west line of said private street about thirty-one (31) feet nine (9) inches, to the place of beginning.

Also all the right, title and interest of the party of the first part, in and to the Beach of said Lake Ontario in front of said private street or avenue, and a distance of one hundred (100) feet westerly therefrom, subject to any rights and privileges, in and to said Beach which may have been heretofore conveyed to James M. Whitney.

Also all the right, title and interest of the party of the first part, in and to said private street or avenue leading from Beach Avenue to Lake Ontario.

The above described premises being the same that were conveyed by Chalotte G. Burnham, Harriett Burnham and Mary P. Burnham, sole heirs-at-law and next-of-kin of Charles G. Burnham, to Guaranty Trust Company of New York, by deed dated November 1, 1900, recorded in the office of the Clerk of said County in Liber 664 of Deeds at page 459; and same premises that were conveyed by Guaranty Trust Company of New York to New York State Realty and Terminal Company, by deed dated January 29, 1907, recorded in the Office of the Clerk of said County in Liber 745 of Deeds, page 191.

Together with the appurtenances and all the estate and rights of the party of the first part in and to the said premises.

To Have and to Hold the above granted premises unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and this instrument to be signed by its President, the day and year first above written.

New York State Realty and Terminal Company, by A. H. Smith, President. (Seal.)

[fol. 1319] Attest: D. W. Pardee, Secretary.

STATE OF NEW YORK,
County of New York, ss:

On this 17th day of August, 1915 before me personally came Alfred H. Smith, to me personally known, who, being by me duly sworn, did depose and say: That he resides at Chappaqua, in the County of Westchester, and State of New York; that he is the President of the New York State Realty and Terminal Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by authority of the Board of Directors of the said corporation, and that he signed his name thereto as President of said corporation, by the like authority.

J. F. Desmond, Notary Public, Westchester Co., N. Y. Certificate filed in New York County Clerk's — #110. Register #6021. My Commission expires March 30, 1916. (Seal.)

No. 21882

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court of the said County, the same being a Court of Record, Do Hereby Certify, that J. F. Desmond whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment a Notary Public, acting in and for the said County, duly commissioned and sworn and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Westchester with [fol. 1320] his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 20 day of Aug. 1915.

Wm. F. Schneider, Clerk. (Seal.)

[fol. 1320a] [Endorsed:] Copy. Bargain and Sale Deed. New York State Realty and Terminal Company to Bartholomay Brewery Company. (A True Copy of the Original Rec'd. in Monroe County Clerk's Office August 30, 1915, at 9:56 A. M., in Liber 968 of Deeds, at page 248.) Hubbel, Taylor, Goodwin and Moser, 31 Exchange Street, Rochester, N. Y.

[fol. 1321] DEFENDANTS' EXHIBIT IN EVIDENCE

(Fort Harmar Treaty, Pages 1 and 2 of American State Papers, Indian Affairs, Vol. 1)

The Six Nations, the Wyandots, and Others

Communicated to the Senate May 25, 1789

GENTLEMEN of the SENATE: In pursuance of the order of the late Congress, treaties between the United States and several nations of Indians, have been negotiated and signed. These treaties, with sundry papers respecting them, I now lay before you, for your consideration and advice, by the hands of General Knox, under whose official superintendence the business was transacted, and who will be ready to communicate to you any information on such points as may appear to require it.

New York, May 25, 1789.

Geo. Washington.

[fol. 1322] (Fort Harmar Treaty, Pages 1 and 2 of American State Papers, Vol. V, Indian Affairs, Vol. 1)

Articles of a treaty made at Fort Harmar, the ninth day of January, in the year of our Lord one thousand seven hundred and eighty-nine, between Arthur St. Clair, Esquire, Governor of the territory of the United States of America northwest of the river Ohio, and commissioner plenipotentiary of the said United States for removing all causes of controversy, regulating trade, and settling boundaries, between the Indian nations in the northern department, and the said United States, of the one part, and the sachems and warriors of the Six Nations, of the other part, viz.

Article 1. Whereas the United States, in Congress assembled, did, by their commissioners, Oliver Wolcott, Richard Butler, and Arthur Lee, Esquires, duly appointed for that purpose, at a treaty held with the said Six Nations, viz: with the Mohawks, Oneidas, Onondagas, Tuscaroras, Cayugas, and Senecas, at fort Stanwix, on the twenty-second day of October, one thousand seven hundred and eighty-four, give peace to the said nations, and receive them into their friendship and protection: And whereas the said nations have now agreed, to and with the said Arthur St. Clair, to renew and confirm all the engagements and stipulations entered into at the before mentioned treaty at fort Stanwix: And whereas it was then and there agreed, between the United States of America and the said Six Nations, that a boundary line should be fixed between the lands of the said Six Nations and the territory of the said United States, which boundary line is as follows, viz: Beginning at the mouth of a creek, about four miles east of Niagara, called Ononwayea, or Johnston's Landing Place, upon the lake named by the [fol. 1323] Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of the carrying place, be-

tween lake Erie and lake Ontario, to the mouth of Tehoseroron, or Buffalo creek, upon lake Erie; thence south, to the northern boundary of the State of Pennsylvania; thence west, to the end of the said north boundary; thence south, along the west boundary of the said State, to the river Ohio. The said line, from the mouth of Ononwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claim to the country west of the said boundary; and then they shall be secured in the possession of the lands they inhabit east, north, and south of the same, reserving only six miles square, round the fort of Oswego for the support of the same. The said Six Nations, except the Mohawks, none of whom have attended at this time, for and in consideration of the peace then granted to them, the presents they then received, as well as in consideration of a quantity of goods, to the value of three thousand dollars, now delivered to them by the said Arthur St. Clair, the receipt whereof they do hereby acknowledge, do hereby renew and confirm the said boundary line in the words before mentioned, to the end that it may be and remain as a division line between the lands of the said Six Nations and the territory of the United States, forever. And the undersigned Indians, as well in their own names as in the name of their respective tribes and nations, their heirs and descendants, for the considerations before mentioned, do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, and between the said line and the strait, from the mouth of Ononwayea and Buffalo creek, for them, the said United States of America, to have and to hold the same, in true and abso- [fol. 1324] lute propriety, forever.

Article 2. The United States of America confirm to the Six Nations, all the lands which they inhabit, lying east and north of the before mentioned boundary line, and relinquish and quit claim to the same and every part thereof, excepting only six miles square round the fort of Oswego, which six miles square round said fort is again reserved to the United States by these presents.

Article 3. The Oneida and Tuscarora nations are also again secured and confirmed in the possession of their respective lands.

Article 4. The United States of America renew and confirm the peace and friendship entered into with the Six Nations, (except the Mohawks) at the treaty before mentioned, held at fort Stanwix, declaring the same to be perpetual. And if the Mohawks shall, within six months, declare their assent to the same, they shall be considered as included.

Done at fort Harmar, on the Muskingum, the day and year first above written.

In witness whereof, the parties have hereunto, interchangeably, set their hands and seals.

Ar. St. Clair. (Signed by twenty-four of the sachems and warriors of the Six Nations of Indians.)

Separate Article of the Preceding Treaty

Should a robbery or murder be committed by an Indian or Indians of the Six Nations, upon the citizens or subjects of the United States, or by the citizens or subjects of the United States, or any of them, upon any of the Indians of the said nations, the parties [fol. 1325] accused of the same shall be tried, and if found guilty, be punished according to the laws of the State, or of the Territory of the United States, as the case may be, where the same was committed. And should any horses be stolen, either by the Indians of the said nations, from the citizens or subjects of the United States, or any of them, or by any of the said citizens or subjects from any of the said Indians, they may be reclaimed, into whose possession soever they may have come; and, upon due proof, shall be restored, any sale in open market notwithstanding, and the persons convicted shall be punished with the utmost severity the laws will admit. And the said nations engaged to deliver the persons that may be accused, of their nations, of either of the before mentioned crimes, at the nearest post of the United States, if the crime was committed within the territory of the United States; or to the civil authority of the State, if it shall have happened within any of the United States.

Ar. St. Clair.

[fol. 1325a] [Endorsed:] Treaty Made at Fort Harmar between Arthur St. Clair and Six Nations January 9th, 1789.

[fol. 1326] Defendant's Exhibit in Evidence

(Fort Stanwix Treaty, Page 10 of Vol. V of American State Papers, Indian Affairs, Vol. 1)

Articles of a treaty concluded at fort Stanwix on the twenty-second day of October, one thousand seven hundred and eighty-four, between Oliver Wolcott, Richard Butler, and Arthur Lee, commissioners plenipotentiary from the United States in Congress assembled, on the one part, and the sachems and warriors of the Six Nations, on the other.

The United States of America give peace to the Senecas, Mohawks, Onondagas, and Cayugas, and receive them into their protection, upon the following conditions:

Article 1. Six hostages shall be immediately delivered to the commissioners by the said nations, to remain in possession of the United States till all the prisoners, white and black, which were taken by the said Senecas, Mohawks, Onondagas, and Cayugas, or by any of them, in the late war, from among the people of the United States, shall be delivered up.

Art. 2. The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled.

Art. 3. A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly, in a direction always four miles east of the carrying path, between lakes Erie and Ontario, to the mouth of Tehosereron, or Buffalo creek, on lake Erie; thence south, to the north boundary of the State of Pennsylvania; thence west, to the end of the said north boundary; thence south, along the west boundary of the said State, to the river Ohio; the said line, from the mouth of the Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations; so that the Six Nations shall and do yield to the United States, all claims to the country west of the [fol. 1327] said boundary; and then they shall be secured in the peaceful possession of the lands they inhabit, east and north of the same; reserving only six miles square round the fort of Oswego, to the United States, for the support of the same.

Art. 4. The commissioners of the United States, in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States, upon the signing of the above articles, will order goods to be delivered to the said Six Nations, for their use and comfort.

Oliver Wolcott, Richard Butler, Arthur Lee. (Signed by the sachems and warriors of the Mohawk, Onondaga, Seneca, Oneida, Cayuga, Tuscarora, and Seeneca Abeal tribes of Indians.)

[fol. 1327a] [Endorsed:] Treaty at Fort Stanwix between Oliver Wolcott, Richard Bulter, and Arthur Lee, Commissioners, &c., and The Six Nations, October 22nd, 1784.

[fol. 1328] DEFENDANTS' EXHIBIT IN EVIDENCE

(Page 211, Vol. 5 of American State Papers, Vol. 1 Indian Affairs)

A Quitclaim from the Four Nations of Indians Acknowledging Payment

We, the sachems, chiefs, and warriors, of the Mohawk, Onondago, Cuyahuga, and Tuscarora nations, for ourselves, and in behalf of the four nations aforesaid, have heard read and explained, in public council at this place, the papers passed between Oliver Phelps, Esq. and the Five Nations of Indians, in full and public council, at our great council fi*l*e, at Buffalo creek, in July, 1788; and find said papers conformable to the agreement then and there made, between said Phelps and the said Five Nations, and do hereby ratify and confirm said agreement, as being fairly and properly done, agreeable

to the ancient customs of our forefathers; and having given up to the Seneca nation, our several proportions of the payment now due and offered to the said Five Nations by said Phelps, in a just and proper manner, in a full council of the Five Nations, viz: Two thousand five hundred dollars in cash, and two thousand five hundred dollars value in goods, we hereby quit all claims, right, title, or demand, whatsoever, to all that certain tract, parcel, land, and territory purchased from the Five Nations, by said Phelps agreeable to the deeds given him, the said Phelps by the Five Nations aforesaid, at Buffalo creek; and to all moneys, goods, or other payments whatsoever, due by said Phelps for said lands, except always reserving our just share and porportion of five hundred dollars, the annual rent to be paid on said lands forever.

Given under our hands and seals, at Canadqua, this 4th day of August, in the year of our Lord one thousand seven hundred and eighty nine.

[fol. 1329] Sharonyewanen, (L. S.), Kagondenayen, (L. S.), Tchodageranden, (L. S.), Ojageghte, (L. S.), Karonyageten, (L. S.), Skagoyeghwatha, (L. S.), Tewaghtagote, (L. S.), Aghshigwaresere, (L. S.), Tekaraghke, (L. S.), Otstenragongh, (L. S.), Karonghyontye, (L. S.), Thayendanegea, (L. S.).

In presence of Samuel Street, Lemuel Wilmet.

Newton Point,
In the State of New York, July 7th, 1791.

At the request of Oliver Phelps, Esq. I questioned the Onondaga chief, Sharonyowanen, and the Cayuga chief, Ojagegte, (usually called the Fish Carrier) relative to the contents of the foregoing written paper, to which their names are subscribed. They said they did not remember what were the papers therein mentioned to have been read and explained to them; but they well remembered the bargain made between Mr. Phelps and the Five Nations, for the land he purchased of them at the treaty at Buffalo Creek was this: that Mr. Phelps was to pay five thousand dollars for the purchase, and five hundred dollars every year forever. That this is well known to the other chiefs of their two nations, and that they never heard one of them say anything to the contrary. Then, when at Konnaudaugua about two years ago, they, with other chiefs of their nation, and of the Mohawks and Tuscaroras, signed a paper [fol. 1330] to confirm the bargain which has been made with Mr. Phelps, at Buffalo Creek.

Joseph Smith and Jasper Parrish, my interpreters, inform me, that the Onondaga Chief and the Fish Carrier, above named, are the head chiefs of their two nations.

Timothy Pickering, Commissioner in Behalf of the United States, for Holding a Treaty with the Six Nations.

[fol. 1330a] [Endorsed:] Quit Claim from Four Nations of Indians, August 4th, 1789.

[fol. 1331] DEFENDANT'S EXHIBIT IN EVIDENCE

(Pickering Treaty, Page 545 of Indian Affairs, Vol. I, American State Papers, Vol. V)

A Treaty Between the United States of America and the Tribes of Indians Called the Six Nations

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the sachems, chiefs, and warriors, of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations:

Article 1. Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Art. 2. The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga nations, in their respective treaties with the State of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Art. 3. The land of the Seneca nation is bounded as follows: beginning on Lake Ontario, at the northwest corner of the land they [fol. 1332] sold to Oliver Phelps; the line runs westerly along the lake, as far as Oyongwongyeh creek, at Johnston's Landing Place, about four miles eastward, from the fort of Niagara: then, southerly, up that creek to its main fork; then, straight to the main fork of Stedman's creek, which empties into the river Niagara, above Fort Schlosser; and then onward, from that fork, continuing the same straight course, to that river; (this line, from the mouth of Oyongwongyeh creek, to the river Niagara, above Fort Schlosser, being the eastern boundary of a strip of land, extending from the same line to Niagara river, which the Seneca Nation ceded to the King of Great Britain, at a treaty held about thirty years ago, with Sir Wm. Johnston); then the line runs along the Niagara river to Lake Erie; then along Lake Erie, to the northeast corner of a triangular piece of land, which the United States conveyed to the State of Pennsylvania, as by the President's patent, dated the third day of March, 1792; then due south to the northern boundary of that State; then due east to the southwest corner of the land sold by the

Seneca nation to Oliver Phelps; and then north and northerly, along Phelps' line, to the place of beginning, on Lake Ontario. Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneca nation; and the United States will never claim the same, nor disturb the Seneca nation, nor any of the Six Nations, or of their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

Art. 4. The United States having thus described and acknowledged what lands belongs to the Oneidas, Onondagas, Cayugas, and Senecas, and engaged never to claim the same, nor to disturb them, [fol. 1333] or any of the Six Nations, or their Indian friends residing thereon, and united with them, in the free use and enjoyment thereof; now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof.

Art. 5. The Seneca Nation, all others of the Six Nations concurring, cede to the United States the right of making a wagon road from Fort Schlosser to Lake Erie, as far south as Buffalo creek; and the people of the United States shall have the free and undisturbed use of this road, for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbors and rivers adjoining, and within their respective tracts of land, for the passing and securing of vessels and boats, and liberty to land their cargoes, where necessary, for their safety.

Art. 6. In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations; and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established strong and perpetual, the United States now deliver to the Six Nations, and the Indians of the other nations residing among, and united with them, a quantity of goods, of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars heretofore allowed them by an article ratified by the President, on the twenty third day of April, 1792, making in the whole four thousand five hundred dollars; which shall be ex- [fol. 1334] pended yearly, forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them; and be employed for their benefit. The immediate application of the whole annual allowance now stipu-

lated, to be made by the superintendent, appointed by the President, for the affairs of the Six Nations, and their Indian friends aforesaid.

Art. 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that, for injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other; by the Six Nations, or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve our peace and friendship unbroken, until the Legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE.—It is clearly understood by the parties to this treaty, that the annuity, stipulated in the sixth article, is to be applied for the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes, or families of Indians, elsewhere resident.

[fol. 1335] In witness whereof, the said Timothy Pickering, and the sachems and warrior chiefs of the said Six Nations, have hereunto set their hands and seals.

Done at Canandaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four.

Timothy Pickering. (Signed by fifty-nine sachems and warrior chiefs of the Six Nations.)

[fol. 1335a] [Endorsed:] "Pickering Treaty" between the United States of America and the Tribes of Indians called the Six Nations, November 11th, 1794.

[fol. 1336] DEFENDANTS' EXHIBIT IN EVIDENCE

(Big Tree Treaty, Page 627 of Indian Affairs, Vol. 1, American State Papers, Vol. V)

Contract Entered Into, Under the Sanction of the United States of America, Between Robert Morris and the Seneca Nation of Indians

This indenture, made the fifteenth day of September, in the year of our Lord one thousand seven hundred ninety seven, between the Sachems, chiefs, and warriors, of the Six nations of Indians, of the first part, and Robert Morris, of the city of Philadelphia, Esquire, of the second part:

Whereas the Commonwealth of Massachusetts have granted, bargained, and sold, unto the said Robert Morris, his heirs and assigns, forever, the pre-emptive right, and all other the right, title, and interest, which the said Commonwealth had to all that tract of land hereinafter particularly mentioned, being part of a tract of land lying within the State of New York, the right of pre-emption of the soil whereof, from the native Indians, was ceded and granted by the said State of New York, to the said Commonwealth; and whereas, at a treaty, held under the authority of the United States, with the said Seneca nation of Indians, at Genesee, in the County of Ontario, and State of New York, on the day of the date of these presents, and on sundry days immediately prior thereto, by the Honorable Jeremiah Wadsworth, Esquire, a commissioner appointed by the President of the United States to hold the same, in pursuance of the Constitution, and of the act of the Congress of the United States, in such case made and provided, it was agreed, in the presence and with the approbation of the said commissioner, by the Sachems, chiefs, and warriors, of the said nation of Indians, for themselves, and in behalf of their nation, to sell to the said Robert Morris, and to his heirs and assigns, forever, all their right to all that tract of land [fol. 1337] above recited, and hereinafter particularly specified, for the sum of one hundred thousand dollars, to be by the said Robert Morris vested in the stock of the bank of the United States, and held in the name of the President of the United States, for the use and behoof of the said nation of Indians, the said agreement and sale being also made in the presence, and with the approbation of the Honorable William Shepard, Esquire, the superintendent appointed for such purpose, in pursuance of a resolve of the General Court of the Commonwealth of Massachusetts, passed the eleventh day of March, in the year of our Lord one thousand seven hundred ninety one:

Now this indenture witnesseth, that the said parties of the first part for and in consideration of the premises above recited, and for divers other good and valuable considerations then thereunto moving, have granted, bargained, sold, aliened, released, enfeoffed and confirmed; and by these *presence* do grant, bargain, sell, alien, release enfeoff, and confirm, unto the said party of the second part, his heirs and assigns, forever, all that certain tract of land, except as is hereinafter excepted, lying within the county of Ontario, and State of New York, being part of a tract of land, the right of pre-emption whereof was ceded by the State of New York to the Commonwealth of Massachusetts, by deed of cession, executed at Hartford, on the sixteenth day of December, in the year of our Lord one thousand seven hundred and eighty-six, being all such part thereof as is not included in the Indian purchase made by Oliver Phelps and Nathaniel Gorham, and bounded as follows, to-wit: easterly, by the land confirmed to Oliver Phelps and Nathaniel Gorham, by the Legislature of the Commonwealth of Massachusetts, by an act passed the twenty-first day of November, in the year of our Lord one thou- [fol. 1338] sand seven hundred eighty-eight; southerly, by the north boundary line of the State of Pennsylvania: westerly, partly by a

tract of land, part of the land ceded by the state of Massachusetts to the United States, and by them sold to Pennsylvania, being a right angled triangle whose hypothenuse is in or along the shore of lake Erie · partly by Lake Erie, from the northern point of that triangle to the southern bounds of a tract of land one mile in width, lying on and along the east side of the strait of Niagara, and partly by the said tract to Lake Ontario; and on the north by the boundary line between the United States and the King of Great Britain: excepting, nevertheless, and always reserving out of this grant and conveyance, all such pieces or parcels of the aforesaid tract, and such privileges thereunto belonging, as are next hereinafter particularly mentioned; which said pieces or parcels of land, so excepted, are, by the parties to these presents, clearly and fully understood to remain the property of the said parties of the first part, in as full and ample manner as if these presents had not been executed, that is to say: excepting and reserving to them, the said parties of the first part, and their nation, one piece or parcel of the aforesaid tract, at Canawagus, of two square miles, to be laid out in such manner as to include the village, extending in breadth one mile, along the river; one other piece or parcel at Big Tree, of two square miles, to be laid out in such manner as to include the village, extending in breadth along the river one mile; one other piece or parcel of two square miles at Little Beard's town, extending one mile along the river, to be laid off in such manner as to include the village; one other tract, of two square miles, at Squawky Hill, to be laid off as follows: to wit: one square mile to be laid off along the river, in such manner as to include the village, [fol. 1339] the other directly west thereof, and contiguous thereto; one other piece or parcel at Gardeau, beginning at the mouth of Steep Hill creek, thence due east, until it strikes the old path, thence south, until a due west line will intersect with certain steep rocks on the west side of Genesee river, then extending due west, due north, and due east, until it strikes the first mentioned bound, including as much land on the west side as on the east side of the river. One other piece or parcel of land at Kaounadear, extending in length eight miles along the river, and two miles in breadth. One other piece or parcel at Cataraugus, beginning at the mouth of the Eighteen-mile, or Koghquaugu creek, thence a line or lines to be drawn parallel to lake Erie, at the distance of one mile from the lake, to the mouth of Cataraugus creek, thence a line or lines extending twelve miles up the north side of said creek, at the distance of one mile therefrom, thence a direct line to the said creek, thence down the said creek to lake Erie, thence along the lake to the first mentioned creek, and thence to the place of beginning. Also, one other piece at Cataraugus, beginning at the shore of Lake Erie, on the south side of Cataraugus creek, at the distance of one mile from the mouth thereof, thence running one mile from the lake, thence on a line parallel thereto to a point within one mile from the Connondauweyea creek, thence up the said creek one mile, on a line parallel thereto, thence on a direct line to the said creek, thence down the same to Lake Erie, thence along the lake to the place of beginning. Also one other piece or parcel of forty-two square miles, at or near the

Alleghany river. Also, two hundred square miles, to be laid off partly at the Buffalo and partly at the Tannawanta creeks. Also, excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the said tract [fol. 1340] of land hereby intended to be conveyed. And it is hereby understood by and between the parties to these presents, that all such pieces or parcels of land as are hereby reserved, and are not particularly described as to the manner in which the same are to be laid off, shall be laid off in such manner as shall be determined by the Sachems and chiefs residing at or near the respective villages where such reservations are made, a particular note whereof to be endorsed on the back of this deed, and recorded therewith, together with all and singular the rights, privileges, hereditaments, and appurtenances, thereunto belonging, or in anywise appertaining. And all the estate, right, title, and interest, whatsoever, of them the said parties of the first part, and their nation, of, in, and to, the said tract of land above described, except as is above excepted, to have and to hold all and singular the said granted premises, with the appurtenances, to the said party of the second part, his heirs and assigns, to his and their proper use, benefit and behoof, forever.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals, the day and year first above written.

Robert Morris, by His Attorney, Thomas Morris. (Signed, also, by fifty-two sachems, chiefs, and warriors, of the Seneca nation of Indians.)

Done at a full and general treaty of the Seneca nation of Indians, held at Genesee, in the County of Ontario, and State of New York, on the fifteenth day of September, in the year of our Lord one thousand seven hundred and ninety-seven, under the authority of the United States.

In testimony whereof, I have hereunto set my hand and seal, the day and year aforesaid.

Jere. Wadsworth.

[fol. 1341] Pursuant to a resolution of the Legislature of the Commonwealth of Massachusetts, passed the eleventh day of March, in the year of our Lord one thousand seven hundred and ninety-one, I have attended a full and general treaty of the Seneca nation of Indians, at Genesee, in the county of Ontario, when the within instrument was duly executed in my presence, by the sachems, chiefs, and warriors, of the said nation, being fairly and properly understood and transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction: I do, therefore, certify and approve of the same.

Wm. Shepard.

Subscribed in presence of Nat W. Howell.

[fol. 1341a] [Endorsed:] Big Tree Treaty between Robert Morris and the Seneca Nation of Indians, September 15th, 1797.

[fol. 1342] DEFENDANTS' EXHIBIT IN EVIDENCE

(Page 588, Documentary History of New York, Vol. 1)

Boundary Line Between the Whites and Indians

1765

Deed Executed at Fort Stanwix Nov. 5, 1768, Establishing a Boundary Line Between the Whites and Indians of the Northern Colonies.

(Lond. Doc. XLI)

To all to whom these presents shall come or may concern:

We the Sachems & Chiefs of the Six Confederate Nations, & of the Shawaneese, Delawares, Mingoes of Ohio & other Dependant Tribes on behalf of ourselves & of the rest of our Several Nations the Chiefs & Warriors of whom are now here convened, by Sir William Johnson Baronet His Majesty's Superintendent of our affairs send Greeting. Whereas His Majesty was graciously pleased to propose to us in the year one thousand seven hundred & sixty five that a Boundary Line should be fixed between the English & Us to ascertain & establish our Limitts and prevent those intrusions & encroachments of which we had so long & loudly complained & to put a stop to the many fraudulent advantages which had been so often taken of us in Land affairs, which Boundary appearing to us a wise and good measure we did then agree to a part of a Line & promised to settle the whole finally when so ever Sir William Johnson should be fully empowered to treat with us for that purpose. And Whereas his said Majesty has at length given Sir William Johnson orders to compleat the said Boundary Line between the Provinces & Indians in conformity to which orders Sir William Johnson has convened the Chiefs & Warriors of our respective Nations who are the true & absolute Proprietors of the Lands in question and who are here now to a very considerable Number. And Whereas many uneasynesses & doubts have arisen amongst us which have given rise to an apprehension [fol. 1343] that the Line may not be strictly observed on the part of the English in which case matters may be worse than before which apprehension together with the dependant state of some of our Tribes & other circumstances which retarded the Settlement & became the subject of some Debate Sir William Johnson has at length so far satisfied us upon, as to induce us to some to an agreement concerning the Line which is now brought to conclusion the whole being fully explained to us in a large Assembly of our People before Sir William Johnson and in the presence of His Excellency the Governor of New Jersey the Commissioners from the Provinces of Virginia and Pennsilvania & sundry other Gentlemen by which Line so agreed upon, a considerable Tract of Country along several Provinces is by us ceded to His said Majesty which we are induced to & do hereby ratify & confirm to His said Majesty from the expectation & confidence

we place in His royal Goodness that he will graciously comply with our humble requests as the same are expressed in the speech of the several Nations addressed to His Majesty through Sir William Johnson on Tuesday the first of the Present Month of November wherein we have declared our expectation of the continuance of His Majesty's favour & our desire that our ancient Engagements be observed & our affairs attended to by the officer who has the management thereof enabling him to discharge all these matters properly for our interest. That the Lands occupied by the Mohocks around their villages as well as by any other Nation affected by this our cession may effectually remain to them & to their Posterity & that any engagements regarding property which they may now be under may be prosecuted & our present Grants deemed Valid on our parts with the several other humble requests contained in our said speech. And Whereas at the settling of the said Line it appeared that the Line described by His Majesty's order was not extended to the Northward of Oswegy or to the Southward of Great Kanhawa river We have [fol. 1344] agreed to & continued the Line to the Northward on a supposition that it was omitted by reason of our not having come to any determination concerning its course at the Congress held in one thousand seven hundred & sixty five and in as much as the Line to the Northward became the most necessary of any for preventing encroachments at our very Towns & Residences We have given the line more favorably to Pen-sylvania for the reasons & considerations mentioned in the Treaty, we have likewise continued it South to Cherokee River because the same is & we do declare it to be our true Bounds with the Southern Indians & that we have an undoubted right to the Country as far South as that River which makes the cession to His Majesty much more advantageous than that proposed. Now therefore Know Ye that we the Sachems & Chiefs aforementioned Native Indians or Proprietors of the Lands hereinafter described for & in behalf of ourselves & the whole of our Confederacy for the considerations hereinbefore mentioned and also for and in consideration of a valuable Present of the several Articles in use amongst Indians which together with a large sum of money amount in the whole to the sum of Ten thousand four Hundred and sixty pounds seven shilling & three pence sterling to Us now delivered & paid by Sir William Johnson Baronet His Majesty's sole agent and superintendent of Indians affairs for the Northern department of America in the name and on behalf of our Sovereign Lord George the third by the Grace of God of Great Britain France & Ireland King Defender of the Faith the receipt whereof we do hereby acknowledge. We the said Indians Have for us and our Heirs & Successors granted bargained sold released & confirmed & by these presents Do grant bargain sell release and confirm unto our said Sovereign Lord King George the Third All that Tract of Land situate in North America at the Back of the British Settlements bounded by a Line which we have [fol. 1345] now agreed upon & do hereby establish as the Boundary between us & the British Colonies in America beginning at the Mouth of Cherokee or Hogohege River where it emptys into the River Ohio

& running from thence upwards along the South side of said River to Kittanning which is above Fort Pitt from thence by a direct Line to the nearest Fork of the west branch of Susquehanna thence through the Allegany Mountains along the south side of the said West Branch until it comes opposite to the mouth of a creek called Tiadaghton thence across the West Branch along the South Side of that Creek & along the North Side of Burnetts Hills to a Creek called Awandae thence down the same to the East Branch of Sasquehanna and across the same and up the East side of that River to Oswegy from thence East to Delawar River and up that River to opposite where Tianaderha falls into Sasquehanna thence to Tianaderha & up the West side of the West Branch to the head thereof & thence by a direct Line to Canada Creek where it emptys into the Wood Creek at the West of the Carrying Place beyond Fort Stanwix & extending Eastward from every part of the said Line as far as the Lands formerly purchased so as to comprehend the whole of the Lands between the said Line & the purchased Lands or settlements, except what is within the province of Pennsylvania, together with all the Hereditaments and appurtenances to the same belonging or appertaining in the fullest and most ample manner and all the Estate Right Title Interest Property Possession Benefit claim and Demand either in Law or Equity of each and every of us of in or to the same or any part thereof to have and to hold the whole Lands and Premises hereby granted bargained sold released and confirmed as aforesaid with the Hereditaments and appurtenances thereunto belonging under the Reservations made in the Treaty unto our said Sovereign Lord King George the third his Heirs & Successors to and for his and their own proper use and behoof for ever. In witness whereof We the Chiefs of the Confederacy have hereunto set our marks and Seals at Fort Stanwix the fifth day of November one thousand seven hundred and sixty eight in the ninth year of His Majesty's Reign.

(Here follows reproduction of original page 1346.)

[fol. 1346a] [Endorsed:] Boundary Line Between the Whites and Indians (1765). Deed executed at Fort Stanwix, Nov. 5. 1768. Sutherland and Dwyer, Rochester Savings Bank Building, Rochester, New York.

for the Mohawks.

Tyorhansere als Abraham (L.S)

for the Oneidas.

Canaghaguieson (L S)

for the Tuscaroras.

Seguareesera + (L S)

for the Onondagas.

Otsinoghiyata als Bunt (L S)

Tegaaia

for the Cayugas

(L S)

for the Senecas

Guastrax (L S)

Sealed and delivered and the consideration paid
in the presence of

Wm. Franklin Governor of New Jersey
Fre. Smyth Chief Justice of New Jersey
Thomas Walker Commissioner for Virginia
Richard Peters) of the Council
James Tilghman) of Pensylvania

The above Deed was executed in my presence at Fort Stanwix the
day and year above Written.

W. Johnson 1346

[fol. 1347] DEFENDANTS' EXHIBIT IN EVIDENCE

See p. 865 of Minutes

Deed from Oliver Phelps to Sturgin Sloan

(Liber 9, Page 412)

Oliver Phelps

to

Sturgin Sloan

To all people to whom these presents shall come, Greeting:

Know ye, that I, Oliver Phelps of Suffield, in the County of Hartford and State of Connecticut Esq'r for and in consideration of the sum of eighty-four pounds current money of the Commonwealth aforesaid, to me in hand paid before the ensealing hereof by Sturgin Sloan of Hudson and County of Columbia and State of New York, the receipt whereof I do hereby acknowledge and am fully satisfied, contented and paid have given, granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do freely, clearly and absolutely give, grant, bargain, sell, alien release, convey and confirm unto him, the said Sloan, his heirs and assigns forever; one certain piece or parcel of land lying in the County of Ontario and State of New York, being the one sixteenth part of township number two in the short range of towns so called, said township bounding north on Lake Ontario and east on the Genesee River. The whole township is said to contain eighteen thousand acres, be the same more or less. The one sixteenth aforesaid is to be in common and undivided. To have and to hold the before granted premises with the appurtenances and privileges thereto belonging to him the said Sturgin Sloan, his heirs and assigns, to his and their own proper use, benefit and behoof forevermore, and I the said Oliver Phelps, myself, my heirs, executors and administrators do covenant, promise and grant unto and with the said Sturgin Sloan, his heirs and assigns forever that before and until the ensealing hereof, I am the true, sole, proper and lawful owner and possessor of the before granted premises with the appurtenances, and have in myself good right, full power and lawful authority to give, grant, bargain, sell, alien, release, convey and confirm the same as aforesaid and [fol. 1348] that free and clear and freely and clearly executed, acquitted and discharged of and from all former and other gifts, grants, bargains, sales, leases, mortgages, wills, intails, jointures, dowries, thirds, executions and incumbrances whatsoever, And furthermore, I, the said Oliver Phelps, for myself my heirs, executors and administrators do hereby covenant, promise and engage the before granted premises with the appurtenances unto him the s'd Sturgin, his heirs and assigns forever, to warrant, secure and defend against the lawful claims or demands of any person or persons whatsoever.

In witness whereof, I have hereunto set my hand and seal this eighteenth day of April, in the year of our Lord, one thousand seven hundred and ninety-one.

Oliver Phelps. (L. S.)

Signed, sealed and delivered in presence of us, Martin Kinsley, Eliphat Clark.

STATE OF NEW YORK, ss:

Be it remembered that on the third day of February in the year of our Lord, one thousand seven hundred and ninety-five, personally appeared before me Elihu Chauncey Goodrich, Master in Chancery, Oliver Phelps the Grantor within named. And the said Oliver Phelps acknowledged that he had executed the within Deed as his voluntary act and deed for the uses and purposes therein expressed, and I having perused the same and finding no erasures, obliterations or interlineations do allow the same to be recorded.

Elihu Chauncey Goodrich.

I certify the foregoing to be a true copy of the original, recorded, examined and compared the 18th day of October, 1803, at 11 o'clock A. M.

P. B. Porter, Clk.

(Recorded in 1 of Deeds from Ontario County, page 508.)

STATE OF NEW YORK, ss:

Monroe County Clerk's Office, Rochester, N. Y.

I, James L. Hotchkiss, Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared a copy of deed hereunto annexed, with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, this 7" day of November, A. D., 1923.

James L. Hotchkiss, Clerk. (Seal of Monroe County, Rochester, N. Y.)

[fol. 1348a] [Endorsed:] Deed. Oliver Phelps to Sturgin Sloan.

[fol. 1349] DEFENDANT'S EXHIBIT IN EVIDENCE

See p. 866 of Minutes

Deed from Oliver Phelps to Mary Crosby

(Liber 2, page 237)

Oliver Phelps

to

Mary Crosby

This Indenture, made the fourth day of June, in the year of our Lord one thousand seven hundred and ninety-four between Oliver Phelps, Esquire, of Suffield in the County of Hartford and State of Connecticut, of the first part, and Mary Crosby, wife to Benjamin Crosby, of the District of Williamson in the County of Ontario and State of New York, of the second part.

Witnesseth, that the said party of the first part for and in consideration of the sum of one hundred and fifty pounds New York currency to me in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged have granted, bargained, sold, remised, released, aliened and confirmed and by these present do grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part and to his heirs and assigns forever, twelve hundred acres of land situate in Phelps and Gorhams Purchase, in township number two in the short range west of the Genesee River in the State of New York to be in common and undivided supposed to be about one sixteenth part of said township which township is bounded north on Lake Ontario and each on the Genesee Rover.

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of the said party of the first part either in law or equity of in and to the above bargained premises, with the said hereditaments and appurtenances. To have and to hold the said premises to the said party of the second part, her heirs and assigns, [fol. 1350] to the sole and only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever. And the said party of the first part for his heirs, executors and administrators, doth covenant, bargain, promise and agree to and with the said party of the second part, her heirs and assigns, the above bargained premises in the quiet and peaceable possession of the said party of the second part, her heirs and assigns, will forever warrant and by these presents forever defend the said above mentioned and described premises against all and every person or persons lawfully claiming or to claim the whole or any part thereof.

In witness whereof the said party of the first part have hereunto set my hand and seal the day and year first above written.

Oliver Phelps. (L. S.)

Sealed and delivered in the presence of Benedict Robinson, Augustus Porter.

ONTARIO COUNTY, ss:

Be it remembered that on the fourth day of June, in the year one thousand seven hundred and ninety-four, personally appeared before me Timothy Hosmer, First Judge of the Court of Common Pleas, for the County of Ontario, the within Grantor, who acknowledged that he executed the within deed by signing, sealing and delivering the same, as and for his voluntary act and deed to & for the uses and purposes in the same expressed. And I, having inspected the same and finding therein no material interlineations or erasures, do allow the same to be recorded.

Timothy Hosmer.

I do hereby certify that the foregoing is a true copy of the original, examined and compared therewith June 5th, 1794.

Sam'l Colt, D. Clerk.

(Recorded in Liber 1, Deeds from Ontario County, page 59.)

STATE OF NEW YORK, ss:

Monroe County Clerk's Office, Rochester, N. Y.

I, James L. Hotchkiss, Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared a copy of warranty deed hereunto annexed, with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, this 7" day of November, A. D. 1923.

James L. Hotchkiss, Clerk. (Seal of Monroe County, Rochester, N. Y.)

[fol. 1350a] [Endorsed:] Oliver Phelps to Mary Crosby. Warranty Deed.

[fol. 1351] DEFENDANTS' EXHIBIT IN EVIDENCE

See p. 863 of Minutes

Deed from Nathaniel Gorham and Oliver Phelps to William Ewing

70

Nath'l Gorham & al.

to

William Ewing

This Indenture made this Sixth day of February in the year of our Lord, one thousand seven hundred and ninety,

Between Nathaniel Gorham of the Town of Charleston in the State of Massachusetts and Oliver Phelps of the Town of Suffield and State of Connecticut, Esquires, of the first part, and William Ewing of the County of Ontario and State of New York, Surveyor, of the second part,

Witnesseth, that the said party of the first part for and in consideration of the sum of One thousand and sixty-six pounds, thirteen shillings and four pence, current money of the State of New York, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part thereof discharged forever by these presents, hath granted, bargained, sold, aliened, released, enfeoffed conveyed and confirmed and by these presents doth grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part in his actual possession now being by virtue of a bargain and sale to him thereof made for one whole year by Indenture bearing date the day next before the day of the date of these presents & by force of the statute for transfering of uses into possession, and to his heirs and assigns forever, all that certain tract or parcel of land, lying and being — the County of Ontario, and State of New York, situate on the west side of the Genesee River, bounded on the east by said River and on the North by Lake Ontario, said Tract known and distinguished on a draught, by Township number Two in the short range, viz: The one sixteenth part of said Township in common and undivided to be equally divided in quantity and quality.

Also one other parcel of land, situated & lying on the West side—[fol. 1352] Genesee River, in the County of Ontario afs'd to be one eighth part of a Township of Land—which s'd Township is distinguished on a map of Phelps & Gorham's Purchase, by Township number one in the first range west side of the Genesee River, s'd Township bounded on the East by the Genesee River, the other boundary lines as surveyed in 1789, being more than six miles square, viz: to be a common and undivided one eighth part of s'd Township No. One in first range, W. side of s'd River, be the s'd one eighth part more or less acres of land, s'd Township, No. One being and commencing two miles North of the Indian Village call'd Canawagrus, west side—Genesee River.

Together with all & singular the tenements, hereditaments, emoluments and appurtenances thereunto belonging or in any wise appertaining, and also all the estate, right, title, interest, dower right and title of dower, possession, property, claim and demand whatsoever of the said party of the first part of, in and to the same, and every part and parcel thereof with the appurtenances, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and of every part and parcel thereof.

To have and to hold the above granted and bargained premises with the appurtenances unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever. And the said party of the first part for their heirs, executors and administrators doth hereby covenant and grant to and with the said party of the second part, his heirs and assigns, that he, the said party of the first part now is the true, lawful and rightful owner of all and singular the said above granted and bargained premises, and of every part and parcel thereof, with the appurtenances, and also that he, the said party of the first part, now is lawfully and rightfully seized in his own right, of a good, sure, perfect, absolute and indefeasible [fol. 1353] estate of inheritance in fee simple, of, in and to all and singular the said above granted and bargained premises, with the appurtenances, without any manner of condition, limitation, of use or uses or other matter, cause or thing to alter, change, charge or determine the same, and also that they, the said party of the first part, hath good right, full power and lawful authority in them to grant, bargain, sell, release and convey all and singular the said above granted and bargained premises with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever, according to the true intent and meaning of these presents. And also that the said party of the second part, his heirs and assigns, shall and may from time to time and at all times forever hereafter, peacibly and quietly enter into, have, hold, use, oc-upy, possess and enjoy all and singular the said above granted and bargained premises with the appurtenances without the let suit trouble, hindrance, molestation, interruption denial of them the said party of the first part, their heirs, executors, administrators or assigns, or any other person or persons whatsoever, and that freed and discharged or otherwise well and sufficiently saved and kept harmless and indemnified of and from all former and other bargains, subject nevertheless to the quit-rent due and to become due thereon to the people of this State, and also all gold and silver mines and the lands reserved by Patent for Highways) sales, gifts, grants, leases, mortgages, jointures, dower, right and title of dower, uses, statutes, judgments, executions and of and from all other charges, troubles & incumbrances whatsoever, had, made, committed, done or suffered by the said party of the first part or any other person or persons whatsoever claiming or to claim the same premises, by, from or under him, them or any of them, and also that they, the said party [fol. 1354] of the first part, his heirs, the said grantid and bargain-

premises above mentioned with the appurtenances, unto him, the said party of the second part, his heirs and assigns at all times hereafter will warrant and forever defend.

In witness whereof, the parties to these presents have hereunto interchangeably set their hands and seals the day and year first above written.

Nath. Gorham (L. S.), Oliver Phelps (L. S.), Wm. Ewing (L. S.).

Sealed and delivered in the presence of —. The words "Attorney as aforesaid" in seven places struck out before sealing, signing & delivery. Asa Danforth, Sam'l Lloyd.

NEW YORK, ss:

Be it remembered that on this twenty-first day of February in the year one thousand seven hundred and ninety-two, before me, James M. Hughes, one of the Masters in Chancery, personally came, Samuel Lloyd, who, being duly sworn did depose and say that he was present and saw Nathaniel Gorham, Oliver Phelps and William Ewing severally sign, seal and deliver the within Indenture as the voluntary act & deed, for the uses and purposes therein mentioned and that he, the deponent and Asa Danforth signed their names as Witnesses thereto, in the presence of each other, and I having perused the same and finding no material erasures or interlineations therein, except those noted to have been made before execution theerof, do allow the same to be recorded.

James M. Hughes.

Recorded, examined & compared 31st January, 1815 at 2 o'clock, P. M.

H. Stevens, Dept. Clk.

(Recorded in Liber 2, From Deeds, Genesee County, Page 79).

STATE OF NEW YORK, ss:

Monroe County Clerk's Office, Rochetser, N. Y.

I, James L. Hotchkiss, Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify that I have compared a copy of warranty deed hereunto annexed, with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, this 8" day of November, A. D., 1923.

James L. Hotchkiss, Clerk. (Seal Monroe County, Rochester, N. Y.)

[fol. 1354a] [Endorsed:] Warranty Deed. A. Nath'l Gorham & al. to Wm. Ewing.

[fol. 1355] DEFENDANTS' EXHIBIT IN EVIDENCE

See p. 866 of Minutes

Deed from Elias Jackson to Joseph Annin

(Liber 1, Page 177)

Elias Jackson

to

Joseph Annin

To all people to whom these presents shall come, Greeting:

Know ye, that I, Elias Jackson of Salesburg, Litchfield County and State of Connecticut, for and in consideration of the sum—two hundred and fifty pounds currant money of the State of New York to me in hand paid before the ensealing hereof by Joseph Annin (Surveyor) of the County of Sussex and State of New Jersey, the receipt whereof I do hereby acknowledge am freely satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, conveyed and confirmed and by these presents do freely, clearly and absolutely, give, grant, bargain, sell, alien, release, convey and confirm, unto him, the said Joseph Annin, his heirs and assigns forever, one eighth of township number two in the short range, bound—east by the Genesee River and north by Lake Ontario in common and undivided. To have and to hold the before granted premises with the appurtenances and privileges thereto belonging to him the said Annin, to his heirs and assigns, to his and their own proper use, benefit and behoof forevermore. And I, the said Elias Jackson for myself, my heirs, executors, administrators, do covenant, promise and grant unto *unto* and with the said Annin, his heirs and assigns forever, that before and until the ensealing hereof, that I am the true, sole, proper and lawful owner and possessor of the before granted premises, with the appurtenances thereunto belonging and I have in myself good right and full power and lawful authority to give, grant, bargain, sell, alien, release, convey and confirm the same as aforesaid and that free and clear & freely and clearly executed, acquitted and discharged of and from all former and other gifts, grants, bargains, sales, leases, mortgages, wills, Intails, Jointers, Dowries thirds executions and incumbrances whatsoever, And furthermore, I, the said [fol. 1356] Jackson, for myself, my heirs, executors, administrators do hereby covenant, promise and engage the before granted premises with the appurtenances unto him the said Annin, his heirs and assigns forever to warrant, secure and defend against the lawful claims and demands of any person or persons whatsoever.

In witness whereof, I have hereunto set my hand and seal this fourteenth day of December, one thousand seven hundred and ninety.

Elias Jackson. (L. S.)

Signed, sealed and delivered in presence of us. Elisha Tallmage, Thomas Sisson.

Be it remembered that on the twenty-first day of August one thousand seven hundred and ninety-one, personally appeared before me, Oliver Phelps, Esqr. Judge of the Court of Common Pleas for the County of Ontario, State of New York Elisha Tallmage, who being duly sworn deposeth and saith that he was present and saw Elias Jackson sign, seal and deliver the within instrument as his voluntary act and deed for the uses therein mentioned, that he, this deponent and Thomas Sisson subscribed their names thereto as witness—and I having examined the same and finding therein no material erasures, interlineations or obliterations do allow the same to be recorded.

Oliver Phelps.

I do hereby certify the foregoing to be a true copy of — original examined and compared with the same this 21st day of August, 1791.

Nath. Gorham, Jr., Cl'k.

STATE OF NEW YORK, ss:

Monroe County Clerk's Office, Rochester, N. Y.

I, James L. Hotchkiss, Clerk of the County of Monroe, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared a copy of a deed hereunto annexed, with the original record in this office, and that the same is a correct transcript thereof and of the whole of said original.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said County and Courts, this 23 day of October, A. D., 1924.

James L. Hotchkiss, Clerk. (Seal Monroe County, Rochester, N. Y.

[fol. 1356a] [Endorsed:] Deed Elias Jackson to Joseph Annin. Recorded in Liber 1 of Deeds from Ontario County page 13.

[fol. 1357] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Nov. 30, 1925

It is hereby stipulated by the parties to the above-entitled action that the following shall be printed as part of the record for submission to the Court:

1. The bill of complaint, including the amendment whereby the heirs of Anna T. Granger were substituted for said Anna T. Granger.

2. The answers of the several defendants. Whenever an amended answer was filed the original answer shall be omitted and the amended answer alone printed.

3. The motion for submission to the Special Master.

4. The rule to the Special Master.

5. The testimony taken before the Special Master, omitting,

(a) Pages 2-42, inclusive (being the opening before the Special Master).

(b) The colloquy beginning upon page 544 with the words "Mr. Oviatt: Now if Your Honor please," in the fifth line from the bottom on that page, through the words "He is unable to be here," upon page 548 which immediately precede the cross-examination of the witness Gray by Mr. Oviatt.

(c) The typewritten lists of witnesses and exhibits with reference to the pages in the typewritten record, but substituting therefor a list of witnesses and exhibits with reference to the pages of the printed record.

[fol. 1358] (d) The last question on page 859, which was not answered, and the colloquy in regard thereto ending with the words of Mr. Sutherland, "I am perfectly satisfied," which appear at approximately the middle of page 865.

(e) All references and discussions as to dates and places of hearing and adjournments thereof, such, for example, as the last three lines on page 873.

(f) All title pages and references to appearances subsequent to page 1 of the typewritten record. Pages 874, 875 and 876 of the typewritten record shall be printed with the heading "Excerpt from Shepard Field Notes, Defendants' Exhibit 3."

6 The report of Honorable Wade H. Ellis, Special Master, need not be reprinted, but the printed copies of said report filed by said Special Master shall be authenticated and presented to the Court as a part of the record. The plaintiff's objections and exceptions thereto shall be printed.

7. The stipulation as to the title of the defendants to the various properties, referred to upon page 872 of the typewritten record, shall be reprinted as part of the record but without the map attached thereto. This stipulation should be found attached to said map in the atlas already filed by the defendants immediately following defendants' exhibit 45, namely, the Wilson map, dated June 30, 1874. For purposes of identification, a copy of this stipulation (without signatures) is attached.

A separate stipulation as to the exhibits to be printed will hereafter be filed.

Dated November 20, 1925.

The State of New York, by Albert Ottinger, Attorney-General. City of Rochester, by Clarence M. Platt, Corporation Counsel. James L. Hotchkiss, Clerk of Monroe County, by Gray Webster, County Attorney. Commis- [fol. 1359] soners of Appraisal, by Eugene Van Voorhis. New York Central Railroad Company, and Central Union Trust Company, by Daniel M. Beach. Ontario Beach Hotel & Amusement Company, and The Upton Company, by Arthur E. Sutherland. Emil Boshart and wife and Milton J. McIntyre and wife, by Harry Otis Poole. Bartholomay Company, Inc., by Clarence P. Moser. Commonwealth of Massachusetts, by Jay R. Benton, Attorney General.

[fol. 1360] IN THE SUPREME COURT OF THE UNITED STATES

THE COMMONWEALTH OF MASSACHUSETTS, Plaintiff

vs.

THE STATE OF NEW YORK et als., Defendants

STIPULATION

In order that the record may not be encumbered with the large number of deeds and other documents which would otherwise be offered to show the title claimed by the defendants to the lands described in the bill, it is hereby stipulated in open Court, that, for the purposes of the record in this case, the following facts are true:

1. The treaty of Hartford was duly entered into by the States of Massachusetts and New York on December 16, 1786. A duplicate original of this treaty is on file in the office of the Secretary of State of New York, and was recorded in that office on February 2, 1787, in Deeds, Liber 22, page 38. This treaty was duly recorded with Ontario County Deeds on January 3, 1835, in Liber 56, Deeds, page 449. A duplicate original of this treaty is on file in the office of the Secretary of State in Massachusetts, and is printed in Massachusetts Acts, 1786, page 459, et seq.

2. The deed from the Five Nations to Nathaniel Gorham and Oliver Phelps (Plaintiff's Exhibit 2), executed July 8, 1788, is recorded in the office of the Secretary of State of Massachusetts, in Volume 1, Massachusetts Treaties and Contracts, page 107, et seq.

3. Massachusetts Resolves, 1787, c. 135 (p. 900) approved April 1, 1788, and Massachusetts Acts, 1788, c. 23, p. 35, approved Novem- [fol. 1361] ber 21, 1788, being the agreement of the Commonwealth

of Massachusetts to convey, and the conveyance to Nathaniel Gorham and Oliver Phelps of the tract described therein, were duly recorded as one instrument in the office of the Secretary of State of New York, in Liber 22, Deeds, p. 229, and with Ontario County deeds, Liber 272, page 392, and are now in evidence as Plaintiff's Exhibit 3. The originals of this resolve and act are on file in the office of the Secretary of State of Massachusetts.

4. Between November 21, 1788, and October 4, 1804, said Gorham and Phelps made duly recorded conveyances of certain undivided interests in the tract conveyed to them by said resolve and statute (Plaintiff's Exhibit 3) and said deed from the Five Nations, which conveyances it is not deemed necessary to enumerate.

5. In 1803, one William Shepard, acting in behalf of said Gorham and Phelps, and of divers grantees of Gorham and Phelps, including one Sir William Pulteney, made a survey in which said Shepard laid out a portion of the said Gorham and Phelps purchase, into ranges and townships, including township 2, short range, west of the Genesee River. The original field notes of this survey were deposited in the Pulteney land office in Bath, New York. A volume entitled "William Shepard's Field Notes of Township No. 2, Short Range, 1803, copied from the Original Notes at the Pulteney Land Office by C. B. Parsons, September 14, 1878," was subsequent to September 14, 1878, duly placed on record in the office of County Clerk of Monroe County, and is in evidence as Defendants' Exhibit 3. These notes embrace the survey by which said Shepard laid out the village of Charlotte (now the twenty-third ward of the City of Rochester), including lots 20 and 21 of said township 2, short range, west of the Genesee River, hereafter referred to as town lots 20 and 21. In the same volume (Defendants' Exhibit 3), also appear "David Finley's Field Notes of the Subdivision of Sundry Lots in the Village of Charlotte, 1810, Copied by C. B. Parsons," together with the David Finley map, which survey and map were [fol. 1362] made in behalf of said Phelps and Gorham, and of divers grantees of said Phelps and Gorham.

6. A partition deed (Defendants' Exhibit 1) was made of the following described premises, dated October 4, 1804, acknowledged December 31, 1804, by one of the parties thereto, and January 26, 1811, by fifteen of the parties thereto, the total number of parties being sixteen, including said Phelps and Gorham, Robert Morris and Sir William Pulteney and divers other grantees of Phelps and Gorham, whose names need not be more particularly stated. Said deed and map accompanying the same and therein referred to were recorded in Genesee County Clerk's Office on the first day of February, 1811, in Liber 3 of Deeds, at page 48, and said deed without the map was recorded in Monroe County Clerk's Office in Liber 1 of Genesee County Abstracts, at page 214. Said deed contains, in part, the following grant to Sir William Pulteney:

"The following lots and parts of lots in the 1st division of lots in said Township according to a survey and map of the same made by William Shepard hereto annexed and to which reference is herein had, lots 18, 48, 4, 45, 7, 27, 36, 56, 5, 24, 16, 58, 59, 52, 2, 23, 11, 31, 50, 21, 10, 20, 1, 53, 19, 32, 25, 100 acres in the center of lot 35 bounded east by lands laid off for said Sturgeon Sloan; west by lands laid off for said Nathaniel Norton and Birdsey Norton, north and south by the north and south lines of the lot 112 acres to be laid off on the west end of lot 57 by a line running parallel with the west line of said lot and lot 46, excepting 75 acres on the east part thereof laid off for said Benjamin and Mary Crosby and 127 acres on the west end of lot 49 to be laid off by a line running parallel with the west line of said lot.

Also the following lots in the 2nd division of lots in said Township, lots 11, 13, 3, 24, 23, 7, 12, 19, 32, 1, 25, 34, 18, 2, 6, 30 and 10 and the following Town lots in said Township, lots 3, 26, 27, 12, 35, 38, 25, 21, 1, 32, 20, 34, 31, 9, 10, 13, 4 and 6

To have and to hold the said respective lots, pieces or parcels of the aforesaid tract of land, with the appurtenances, unto the said respective parties."

7. The said partition deed vested in said Sir William Pulteney in severalty all the right, title and interest in and to said Town Lots 20 and 21, and appurtenances thereto, which passed to said Gorham and Phelps by said conveyance to them by the Commonwealth of [fol. 1363] Massachusetts, which is in evidence as Plaintiff's Exhibit 3, and by the deed from the Five Nations, which is in evidence as Plaintiff's Exhibit 2.

8. By divers Wills and descents, the nature of which need not be more particularly set forth, but which were duly recorded in New York, in so far as the same were required to be recorded by law, all the right, title and interest of said Sir William Pulteney in and to said Town Lots 20 and 21 and appurtenances thereto, became vested in William Earl of Craven, Alexander Oswald and Edmund Bucknall Estcourt.

9. On August 27, 1868, by warranty deed, duly recorded in Liber 222 of Deeds, at page 454, in the office of the Clerk of Monroe County, said William Earl of Craven, Alexander Oswald and Edmund Bucknall Estcourt conveyed to one Martin McIntyre the following described premises:

All that Certain Piece or Parcel of Land situated in the Town of Greece, in the County of Monroe and State of New York, known and distinguished as building lot No. twenty-one (21) in the Village of Charlotte, adjoining the Genesee River and Lake Ontario, being in Township No. 2 in the Short Range of Townships, containing four (4) acres, be the same more or less. Subject to all taxes and assessments of every description imposed on said land subsequent to the 1st day of January, 1861.

Together with the appurtenances to said premises belonging, and all the estate, title and interest at law and in equity of the said party of the first part and each of them in the same.

To Have and To Hold the said granted land, with the appurtenances, unto the party of the third part, his heirs and assigns forever.

10. The said deed vested in said Martin McIntyre all the right, title and interest in and to the premises therein described and the appurtenances thereto, which passed to said Gorham and Phelps by the aforesaid conveyance to them by the Commonwealth of Massachusetts, which is in evidence as Plaintiff's Exhibit 3, and all right, title and interest of William Earl of Craven, Alexander Oswald and Edmund Bucknall Estcourt in and to the premises therein described, in law or in equity, and the appurtenances thereto.

11. On October 12, 1872, by deed, duly recorded in Liber 259 of [fol. 1364] Deeds, at page 106, in the office of the Clerk of the County of Monroe, said Martin McIntyre conveyed premises described at No. 9 herein to one Captain John Byrne and his wife, which premises, by the same description, were thereafter conveyed to Patrick Manrow, by deed recorded in Monroe County Clerk's Office in Liber 339 of Deeds, at page 121.

12. On May 31, 1881, by deed recorded in Monroe County Clerk's Office in Liber 341 of Deeds, at page 347, the said Patrick Manrow and Mary, his wife, in consideration of the sum of $37,000, as stated in said deed, conveyed to the New York Central & Hudson River Railroad Company the following described premises:

"All that piece or parcel of land situate in the Village of Charlotte, County of Monroe and State of New York, known and described as village lot No. 21 bounded as follows: on the east by the Genesee River, on the north by Lake Ontario, on the west by a Street known as Broadway and on the south by lot No. 22.

Excepting and reserving, however, all that part of the said lot No. twenty-one bounded as follows: Commencing at the intersection of the south line of said Lot No. twenty-one (21) with the east line of Broadway; thence running east on the said south line of the said lot, one hundred (100) feet; thence north on a line parallel with Broadway, fifty (50) feet; thence west on a line parallel with said south line & fifty (50) feet north therefrom one hundred (100) feet to the east line of Broadway; thence south along the east line of Broadway fifty (50) feet to the place of beginning. * * *"

13. By warranty deed dated July 21, 1863, and recorded in Liber 179 of Deeds, at page 459, in the office of the Clerk of Monroe County, William Earl of Craven, Alexander Oswald and Edmund Bucknal Estcourt conveyed to James M. Whitney and Samuel Wilder a parcel of land described as follows:

Land in the Town of Greece, known and distinguished as Town Lots 20, 23, 25, and 26, in the Village of Charlotte aforesaid, in

Township 2, in the Short Range of Townships, said Lots containing sixteen (16) acres more or less; together with all the right, title and interest of the first parties in and to all the land lying north of Lot 20 to Lake Ontario, and all the land east of Lots 23, 25 and 26 to the middle of the Genesee River.

14. By warranty deed dated February —, 1864, and recordeded in Liber 182 of Deeds, at page 307, in the office of the Clerk of Monroe County, Samuel Wilder and wife conveyed to James M. [fol. 1365] Whitney all of their right, title and interest in and to the Tract or parcel of land known and distinguished as Town Lot 20 in the Village of Charlotte, Township 2, Short Range of Townships, said lot containing — Acres, more or less; together with all the right, title and interest of the first parties in and to all the land lying north of Lot 20 to Lake Ontario.

15. The said deed vested in said James M. Whitney all the right, title and interest in and to the premises therein described, and the appurtenances thereto, which passed to the said Gorham and Phelps by the aforesaid conveyance to them by the Commonwealth of Massachusetts, which is in evidence as Plaintiff's Exhibit 3, and all the right, title and interest of William Earl of Craven, Alexander Oswald and Edmund Bucknall Estcourt in and to the premises therein described, in law or in equity, and the appurtenances thereto.

16. By mesne conveyances, duly recorded in the Office of the Clerk of Monroe County, which conveyances it is not deemed necessary to enumerate, all of the right, title and interest of James M. Whitney in the following described premises—

All that Tract of Land in the Village of Charlotte, town of Greece, known and distinguished as part of Town Lot 20, in Township Two, in the Short Range of Townships, west of the Genesee River, bounded and described as follows: Beginning at the intersection of the center line of Beach Avenue with the westerly line of Lake Avenue; running thence northerly along said westerly line of Lake Avenue to Lake Ontario; thence westerly along the shore of Lake Ontario about five hundred and ninety (590) feet to the westerly line of the premises described in the Bill of Complaint herein; thence southerly along the westerly line of the premises described in the Bill of Complaint herein, parallel to the westerly line of Lake Avenue, to the center line of Beach Avenue; thence easterly along said center line of Beach Avenue six hundred ten and fifty-six hundredths (610.56) feet to the place of beginning—

was conveyed to the defendants Bartholomay Company, Inc., New York Central Railroad Company, Emil Boshart, Rebecca Boshart, Milton J. McIntyre and Belle McIntyre, the portion thereof conveyed to each of said defendants being correctly set forth in the answers filed by them herein respectively.

The conveyances to Bartholomay Company, Inc. were as follows: [fol. 1366] Deed from Edward Harris and wife to Bartholomay Brewery Company, dated May 29, 1889, recorded in Liber 450 of Deeds, at page 331 in the Office of the Clerk of Monroe County, New York, which conveyed all of the premises described in the answer of Bartholomay Company, Inc., except the interests conveyed in the two following deeds: Deed from the New York Central Railroad Company to Bartholomay Brewery Company, dated April 17, 1915, and recorded in Liber 968 of Deeds, at page 246, in the office of the Clerk of Monroe County, New York, which deed conveyed a one-fourth undivided interest in a parcel one hundred feet by seventy feet and an interest in a private street, included within the description of the above-mentioned deed; and Deed from the New York State Realty & Terminal Company to Bartholomay Brewery Company, dated August 17, 1915, and recorded in Liber 968 of Deeds, at page 248, in the office of the Clerk of Monroe County, New York, which deed conveyed a strip of land one hundred feet along the lake and thirty-two feet more or less wide, known as the Burnham strip, and an interest in said private street.

The name of the Bartholomay Brewery Company was duly and legally changed to Bartholomay Company, Inc. in 1919.

The conveyance to Milton J. McIntyre was made by Martha McIntyre by deed dated April 27, 1888, and recorded in Liber 472 of Deeds, at page 256, in the office of the Clerk of Monroe County.

The conveyance to Rebecca Boshart was made by Emil Boshart and Arthur Tischbein, by deed dated April 29, 1912, and recorded in Liber 874 of Deeds, at page 486, in the office of the Clerk of Monroe County.

The conveyance to Emil Boshart was made by the New York Central Railroad Company by deed dated April 25, 1916, and recorded in Liber 990 of Deeds, at page 402.

The conveyance to the New York Central Railroad Company was made by the following conveyances: Deed dated January 31, 1888, recorded in Monroe County Clerk's Office in Liber 435 of Deeds, at [fol. 1367] page 8, from Cyrus Gatewood to Windsor Beach & Ontario Railroad Company, and by deed dated April 27, 1888, recorded in said Clerk's Office in Liber 440 of Deeds, at page 12, from Martha McIntyre to Rome, Watertown & Ogdensburgh Railroad Company.

The defendant, New York Central Railroad Company, is the legal successor of the New York Central & Hudson River Railroad Company, the Rome, Watertown & Ogdensburgh Railroad Company, Rome, Watertown & Ogdensburgh Terminal Railroad Company, Windsor Beach & Ontario Railroad Company, New York State Realty & Terminal Company, and, as such successor, has acquired all the right, title and interest of any of said companies to the premises in dispute.

17. That the mortgage dated June 1, 1897, recorded in Monroe County Clerk's Office in Liber 414 of Mortgages, at page 81, and a supplemental mortgage dated April 16, 1913, recorded in said

Clerk's Office in Liber 643 of Mortgages, at page 1, both made by the New York Central & Hudson River Railroad Company to Central Trust Company of New York (now Central Union Trust Company of New York, defendant herein) are valid and existing liens upon all the right, title and interest of the defendant, The New York Central Railroad Company, to the premises in dispute and described in the complaint.

18. That the mortgage dated July 1, 1874, recorded in Monroe County Clerk's Office in Liber 186 of Mortgages, at page 28, made by the Rome, Watertown and Ogdensburgh Railroad Company to the Farmers Loan and Trust Company is a valid lien upon all the right, title and interest of the Rome, Watertown and Ogdensburgh Railroad Company, which passed to its successors in title, to the premises in dispute and described in the complaint.

19. The grantors in all the deeds forming said chains of title conveyed to the respective grantees in such deeds all the right, title and interest of the grantors, in law or in equity, in and to the premises described thereby, and the appurtenances thereto, and in and to the [fol. 1368] premises in dispute herein and described in the bill; said deeds, except the deed of the Five Nations to Gorham and Phelps (Plaintiff's Exhibit 2), were duly recorded in the State of New York, according to law.

20. The said Town Lots 20 and 21 were originally in Ontario County. They were included in the part of Genesee County that was afterwards set off from Ontario County and are now in that part of Monroe County, which was afterwards set off from Genesee County, and are located in the Twenty-third Ward in the City of Rochester, formerly the Village of Charlotte.

21. The various parcels of land conveyed to the respective defendants by the deeds above mentioned are shown on the accompanying map.

It is further stipulated that any party hereto may introduce in evidence any deed in the aforesaid chain of title or any other or different deeds or documents relating to the premises described in the bill, relevant to the issues herein.

[fol. 1369] [Endorsed:] In the Supreme Court of the United States. The Commonwealth of Massachusetts, Plaintiff, vs. The State of New York, et al., Defendants. Stipulation. Hubbell, Taylor, Goodwin & Moser, Attorneys for Bartholomay Company, Inc. Office and Post Office Address, 31 Exchange Street, Rochester, N. Y.

[fol. 1370] [File endorsement omitted.]

[fol. 1371] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION RE EXHIBITS—Filed December 17, 1925

It is hereby stipulated by the parties to the above-entitled action that in preparing the record for submission to the Court, the exhibits introduced upon the trial shall be treated as follows:

(1) The following exhibits introduced by the plaintiff shall be printed as part of the record:

(Plaintiff's Exhibit 1, the Hartford Treaty, shall not be reprinted but there shall be a notation that said Exhibit is printed as a footnote to the report of the Special Master, pp. 11-16 inclusive.)

Plaintiff's Exhibit 2;
" " 3;
" " 57;
" " 58;
" " 59;
" " 60;
" " 63;
" " 64;
" " 65;
" " 66;
" " 67;
" " 68;
" " 69;
" " 70;
" " 71;
" " 72;
" " 73.

(2) The following exhibits introduced by the plaintiff shall not be printed but shall be pasted into an atlas and submitted to the Court in that form:

Plaintiff's Exhibit 6;
" " 8-56, inclusive,

Omitting, however, Plaintiff's Exhibit 47 for identification, which [fol. 1372] was not introduced in evidence.

Plaintiff's Exhibit 61;
" " 62.

(3) The following exhibits introduced by the defendants shall be printed as part of the record:

The deed forming part of Defendants' Exhibit 1;

The excerpts from the Finley field notes, which appear on pages 80-82 inclusive of the Stenographer's Minutes, shall be printed where

it appears in the record with the heading: "Excerpt from Finley Field Notes, Defendants' Exhibit 3".

Defendants' Exhibit 19A.
" " 26
" " 30
" " 31
" " 31A
" " 32
" " 33
" " 34
" " 35
" " 36

The deed forming part of Defendants' Exhibit 39; Defendants' Exhibits 46-52, inclusive.

The following exhibits offered in evidence by the defendants on pages 824-827, inclusive, of the Stenographer's Minutes, which Exhibits were given no numbers:

Fort Palmer Treaty, January 9, 1789; Vol. 5 American State Papers; Vol. 1 of Indian Affairs, pp. 1 and 2;

Fort Stanwix Treaty, Vol. 5 American State Papers, page 10;

Quitclaim deed from four of the Six Nations; Vol. 5 American State Papers, p. 211;

Pickering Treaty, Nov. 11, 1794, Vol. 5 American State Papers, p. 545;

Big Tree Treaty, September 15, 1797, Vol. 5 American State Papers, page 627;

Fort Stanwix Treaty, November 5, 1768; Vol. 1 of the Documentary History of the State of New York.

The following exhibits offered in evidence by the defendants, pages 865 and 866 of the Stenographer's Minutes, which exhibits were given no numbers:

Deed from Oliver Phelps to Sturgin Sloan, April 18, 1791;

Deed from Oliver Phelps to Mary Crosby, June 4, 1794;

[fol. 1373] Deed from Nathaniel Gorham et al. to William Ewing, February 6, 1790;

Deed from Elias Jackson to Joseph Annin, December 23, 1790;

(4) The following exhibits introduced by the defendants shall not be printed but shall be pasted in an atlas and submitted to the Court in that form:

Map attached to Defendants' Exhibit 1;
Defendants' Exhibits 2-25, inclusive;
Defendants' Exhibits 27, 28 and 29;
" " 37 and 38;
Map attached to Plaintiff's Exhibit 39
Defendants' Exhibits 40-45 inclusive;

Map attached to the Ft. Stanwix Treaty of 1768; Vol. 1 Documentary History of the State of New York, at page 588; introduced in evidence Stenographer's Minutes, p. 827.

Dated November —, 1925.

The State of New York, by Albert Ottinger, Attorney-General. City of Rochester, by Clarence M. Platt, Corporation Counsel. James L. Hotchkiss, Clerk of Monroe County, by George Y. Webster. Commissioners of Appraisal, by Eugene Van Vorhis. New York Central Railroad Company, and Central Union Trust Company, by Daniel M. Beach. Ontario Beach Hotel & Amusement Company, and The Upton Company, by Arthur E. Sutherland. Emil Boshart and Wife and Milton J. McIntyre and Wife, by Guy Otis Poole. Bartholomay Company, Inc., by Clarence P. Moser. Commonwealth of Massachusetts, by Jay R. Benton, Attorney General. Edwin H. Abbot, Jr., of Counsel.

[fol. 1374] [Endorsed:] In the Supreme Court of the United States. No. 14 Original—October Term, 1925. Commonwealth of Massachusetts, Plaintiff, vs. State of New York, et al., Defendants. Stipulation. Hubbell, Taylor, Goodwin and Moser, 31 Exchange Street, Rochester, N. Y.

[fol. 1375] [File endorsement omitted.]

Office Supreme Court, U. S.
FILED
MAR 3 1926
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1925

No. 14, ORIGINAL.

THE COMMONWEALTH OF MASSACHUSETTS
Complainant

v.

THE STATE OF NEW YORK et als.,
Respondents

BRIEF FOR THE COMPLAINANT

JAY R. BENTON,
Attorney General for the Commonwealth of Massachusetts.

EDWIN H. ABBOT, JR.,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 14, Original.

THE COMMONWEALTH OF MASSACHUSETTS, COMPLAINANT,

v.

THE STATE OF NEW YORK ET AL.

BRIEF FOR THE COMPLAINANT.

STATEMENT OF THE CASE.

1. The Bill.

This is a bill in equity filed in this court on May 12, 1922, by the Commonwealth of Massachusetts against the State of New York, the City of Rochester, divers citizens and corporations of New York, and two citizens of Illinois. (Rec., pp. 1–3.) The main purpose of the bill is to establish the title of the Commonwealth to a certain tract of land situated upon the margin of Lake Ontario formerly within the village of Charlotte, but now within the present city limits of Rochester, and to remove divers clouds from such title. (Rec., pp. 10–18.)

The bill alleges in substance (Subd. III, part A, R., pp. 3–5) that prior to December, 1786, Massachusetts and New York claimed under conflicting royal grants both sovereignty over and title to the soil of a large area in what is now western New York, extending from the Pennsylvania boundary upon the south to the Canadian boundary upon the north (Rec., p. 3); that this controversy was settled by a treaty made between the two States at Hartford, Connecticut, on December 16, 1786 (Rec., p. 4); that by this treaty New York did cede, grant, release and confirm to Massachusetts the right of preemption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the State of New York had within the following limits and bounds: (describing a large tract extending from the boundary of Pennsylvania upon the south to the international boundary in the midst of Lake Ontario upon the north); that the seventh clause of said treaty provided that no adverse possession of said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts (Rec., pp. 4–5); that by said treaty New York released and conveyed to Massachusetts title to the lands described, including title to the land under the waters of Lake Ontario (Rec., p. 5); that said treaty was duly recorded in the office of the Secretary of the Commonwealth of Massachusetts, and in the office of the Secretary of State of the State of New York, whereby due and timely notice was given of the title of Massachusetts to the lands described in said Hartford Treaty (Rec., p. 5); that included

within the lands so ceded was a certain tract situated in the City of Rochester, County of Monroe and State of New York, bounded and described as set forth in the bill (R., p. 5); and that Massachusetts has never divested itself of title thereto. (R., p. 5.)

The bill then describes in detail certain eminent domain proceedings instituted by the City of Rochester in respect to the tract in controversy (R., pp. 5–10) and also divers conveyances which are alleged to be a cloud upon the title of the Commonwealth (R., pp. 10–16), and further alleges certain negotiations between the City of Rochester and the Commonwealth for the purchase of the tract in controversy, which negotiations await the conclusion of this cause (R., pp. 16–17).

The bill prays that said eminent domain proceedings may be temporarily and permanently restrained; that the title of the Commonwealth to the tract in controversy be established and the several clouds thereon removed; that in the alternative the right of the Commonwealth to receive just compensation from the City of Rochester and the amount thereof be determined and established by this court; and for general relief. (R., pp. 17–18.)

2. The Answers.

All the defendants except the Grangers (see R., p. 42) and the Farmers' Loan and Trust Company have answered. The Farmers' Loan and Trust Company, named as a party defendant because it held a mortgage upon part of the lands in question, released its lien, and is not an interested party (Master's Rep., p. 3). The Grangers filed a motion to dismiss,

which was overruled, and have not elected to file further pleadings (Master's Rep., p. 3). The Upton Company answered (R., p. 52) but since the filing of this bill has quitclaimed to the Ontario Beach Hotel and Amusement Company, and now has no interest in the litigation (Master's Rep., p. 3).

The respective answers of the State of New York (Par. II, R., p. 18); of the City of Rochester (Par. II, R., p. 22); of the Bosharts (Par. VII, R., p. 27); of Hotchkiss, County Clerk of Monroe County (Par. II, R., p. 30); of the Commissioners of Appraisal in the eminent domain proceeding (R., p. 32); of the McIntyres (Par. VII, R., p. 40); of the Ontario Beach Hotel and Amusement Company (Par. IV, R., p. 46); of the Upton Company (Par. III, R., p. 53); of the Bartholomay Company, Inc. (Par. VII, R., p. 61); of the Central Union Trust Company (Par. VI, R., p. 66); and of the New York Central Railroad Company (Par. VI, R., p. 74) admit the due execution and record of the Hartford Treaty as alleged in Subdivision III, part A of the bill (R., pp. 3–5). It is not denied in the answer of the Twentieth Ward Cooperative Savings and Loan Association (R., p. 33), which asserts a mortgage upon the Boshart parcel.

All the answers deny the title of the Commonwealth to the tract in dispute. In addition, each of the several claimants of a part of said tract sets up one or more of the following affirmative defences:

1. Title under a conveyance by Massachusetts to Nathaniel Gorham and Oliver Phelps, dated November 21, 1788, which bounded the tract thereby conveyed upon the shores of Lake Ontario.

2. Title by accretion.
3. Title by adverse possession.
4. That Massachusetts is estopped to assert its alleged title.
5. Laches.
6. The Massachusetts statute of limitations of 1835.

(See answers of the Bartholomay Company, Inc., R., pp. 58–64, and of the New York Central Railroad Company, R., pp. 72–79, through or under which all the other claimants claim title to the tract in dispute.)

3. The Report of the Special Master.

On November 27, 1922, certain of the defendants filed a motion praying as follows (R., p. 34):

> "That this Honorable Court will refer the above entitled case to a Special Master to be designated and appointed, to take the proofs (fol. 73) and make an advisory report to the Court upon the material allegations and questions of fact raised by the pleadings (with his opinion as to the law of the case), except as to the amount of damages to be paid for the property taken by the City of Rochester by eminent domain."

On January 2, 1923, this court, pursuant to the above motion, appointed Wade H. Ellis, Esq., Special Master "to take proofs and make reports to the court in this cause." (R., p. 37.)

The report of the Special Master was filed upon the first Monday of the October Term, 1925. It is not reprinted in the record, but the parties have stipulated that the printed copies of said report filed by the master shall be authenticated and presented to the court as part of the record (R., p. 738, par. 6). It will be cited

in this brief as "Report." As the report is purely advisory and the ultimate findings of fact and rulings of law are to be made by the court upon the record, it was probably unnecessary for the Commonwealth to file objections and exceptions to those portions of the report by which it is aggrieved, but in order to preserve all rights beyond question the Commonwealth has filed such objections and exceptions. (R., p. 79.)

4. Brief Outline of the Facts and Issues.

A. The Hartford Treaty.

Long prior to the Revolution, New York and Massachusetts claimed under conflicting royal grants both sovereignty over and title to the soil of a large territory which now forms most of western New York. (Plff.'s Ex. 1, Preamble.) After the Revolution both States sought to have the controversy determined by a court appointed under Article 9 of the Articles of Confederation, but ultimately appointed commissioners who were authorized to adjust the dispute by a compact. These commissioners met at Hartford, Connecticut, and, on December 16, 1786, executed the Hartford Treaty (so called), which was duly approved and recorded in the office of the Secretary of the Commonwealth of Massachusetts and in the office of the Secretary of State of the State of New York. (Plff.'s Ex. 1; Stipulation, R., p. 739 par. 1; Report, pp. 8, 11–16.) It is printed in the Master's Report (pp. 11–16), but for convenience of reference is reprinted as an appendix to this brief, paragraphed as it appears in the Massachusetts Statutes for 1786, January Session, p. 459 *et seq.*

The Treaty contains eleven articles. By Article I Massachusetts ceded, granted, released and confirmed

to New York all the claim which it had "to the government, sovereignty, and jurisdiction" over the tract in dispute. By Article II New York ceded, granted, released and confirmed to Massachusetts,

"the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property, (the right and title to government, sovereignty and jurisdiction excepted) which the State of *New York*, hath, . . . in or to all the lands and territories within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of *Pennsylvania*, in the parrallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of *Pennsylvania*, on *Delaware River*, as the said boundary-line hath been run and marked by the Commissioners appointed by the States of *Pennsylvania* and *New York* respectively, and from the said point or place of beginning, running on a due meridian north to the boundary line between the United States of *America* and The King of *Great Britain;* thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the Streight or waters between *Lake Ontario* and *Lake Erie;* thence south along the said meridian, to the south shore of *Lake Ontario;* thence on the eastern side of the said Streight, by a line always one mile distant from and parrallel to the said Streight, to *Lake Erie;* thence due west to the boundary line between the United States and the King of *Great Britain;* thence along the said boundary line, until it meets with the line of cession from the State of *New York* to the United States; thence along the said line of cession, to the northwest corner of the State of *Pennsylvania;* and thence east along the northern boundary line of the State of *Pennsylvania* to the said place of beginning: And which said lands and territories so ceded, granted, released and confirmed, are parcel of the lands and territories described in the said petition.

The master advises that this article be so construed as not to convey title to any part of the bed of the lake. (Report, p. 61.) The soundness of this advisory ruling, to which the Commonwealth duly excepted (R., pp. 80, 81, par. 1, 2, 13, 14, 15), presents the first major issue in the case.

B. The Grant to Gorham and Phelps.

On April 1, 1788, the Commonwealth, by Res. 1787, c. 135, accepted a proposal of Nathaniel Gorham and Oliver Phelps to purchase the Western Territory ceded by the Hartford Treaty upon the conditions specified in said resolve, for £300,000 in consolidated securities of the Commonwealth. (Plff.'s Ex. 3, R., p. 598.) These conditions were in substance: —

1. That Gorham and Phelps should extinguish by purchase the claims of the native Indians; such purchases to be made in the presence and with the approval of the Rev. Samuel Kirkland, who was appointed to act as superintendent at the expense of Gorham and Phelps. (See Article X, Hartford Treaty.)

2. That such purchases should be confirmed by the Commonwealth. (See Article X, Hartford Treaty.)

3. That Gorham and Phelps should give satisfactory security to pay the £300,000, in consolidated securities with interest in like securities, one third in one year, one third in two years, and one third in three years from the date of this resolve (*i.e.*, £100,000 on April 1, 1789, £100,000 on April 1, 1790, and £100,000 on April 1, 1791, with interest in each case).

On July 8, 1788, Oliver Phelps, on behalf of himself and Gorham, secured from the Five Nations a warranty deed (approved by Kirkland) which extinguished the Indian claim to substantially one third of the upland comprised in the treaty tract (Plff.'s Ex. 2, R., p. 595). The point of beginning is on the Pennsylvania boundary at the corner described in the Treaty, the western line is fixed by or in reference to "the waters of the Genesee River" and the last course of the western line, the northern line and the eastern line read as follows:

"thence running in a direction northwardly, so as to be twelve miles distance from the most westward bends of said Genesee river to the shore of the Ontario Lake thence eastwardly along the shores of said Lake to a meridian which will pass through the first point or place of beginning above mentioned, thence south along said meridian to the first point or place of beginning aforesaid, together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory, to have and to hold, the above granted and bargained premises, together with all the appurtenances and privileges thereunto belonging or in any wise appertaining, to them the said Oliver Phelps and Nathaniel Gorham and to their heirs and assigns forever: . . . "

(Rec., p. 596.)

Gorham and Phelps submitted this deed to the Legislature of Massachusetts and sought confirmation of their purchase. (See recitals St. 1788, c. 23, October Session, p. 35; Plff.'s Ex. 3, R., p. 599.) On November 21, 1788, the Legislature, by St. 1788, c. 21, "granted & confirmed" to Nathaniel Gorham and Oliver Phelps "all the Right Claim and Demand which the Commonwealth has in and to the following Tract

of Land, to wit: —" (describing it). The description in the statute substantially follows the description furnished by Gorham and Phelps, although there are some changes which will be pointed out hereafter. Like the Indian deed, the point of beginning is on the Pennsylvania boundary at the corner described in the Treaty, the southern line runs along the Pennsylvania boundary, the western line is fixed by or in reference to "the waters of the Genesee River," and the last course of the western line, the northern line, and the eastern line read as follows:

"thence running in a direction northwardly so as to be twelve miles distant from the most westward bounds of the said Genesee River to the Shore of the Ontario Lake; thence eastwardly along the shores of the said Lake to a meridian which will pass through the first point or place of beginning aforementioned; thence south along the said meridian to the first point or place of beginning aforesaid; being such part of the whole tract purchased by the grantees aforesaid as they have obtained a release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging . . ."
(R., p. 600.)

The Indian deed was recorded with the Secretary of the Commonwealth (R., p. 595), but is not shown to have been recorded in the office of the Secretary of State of New York. (Report, p. 23.) Res. 1787, c. 135, and St. 1788, c. 23, were combined in one instrument and recorded in the office of the Secretary of State of New York (R., p. 601), as required by Article XI of the Treaty, and also in Ontario County (R., pp. 602, 739, par. 3), from which Monroe County was later set off. (R., p. 745, par. 20.) Gorham and

Phelps thereby recognized that St. 1788, c. 23, was the controlling and effective conveyance which authoritatively defined the boundaries of their purchase. That statute is a grant by the Commonwealth to two of its citizens. The Lake was the greatest natural monument which nature had placed in that region, yet the description *by which Phelps and Gorham requested the Legislature to convey* calls for "the shore of the Ontario Lake" as the terminal monument of the western line, and carries the northern line "thence eastwardly along the shores of said Lake. The Legislature not only accepted and adopted both the requested calls for the shore, but also struck from the requested description the words:

"together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within and in any wise appertaining to said territory."

and substituted therefor the words:

"being such part of the whole Tract purchased by the Grantees aforesaid as they have obtained a release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging."

The master advises the court to rule that St. 1788, c. 23, conveyed to the line where land and water meet, to which advisory ruling the plaintiff duly excepted (R., pp. 80, 81, pars. 3, 4, 5, 6, 16, 17). The Commonwealth contends that this advisory ruling is erroneous for the following reasons: —

1. The statute must receive the construction placed by the courts of Massachusetts upon the words "to the shore . . . and along the shores."

2. Both in Massachusetts and New York a call for *the shore* of a navigable water as a terminal monument and boundary excludes such shore and does not bound the tract conveyed upon the water.

3. The language of the statute is not to be extended by construction, but is on the contrary to be construed in favor of Massachusetts and against the grantees:—

(*a*) Because it operates as a grant by a sovereign to two of its own citizens.

(*b*) Because the language of the description was tendered and approved by the grantees.

This advisory ruling represents the second major issue of law in the case.

C. The Alleged Practical Construction of Grants.

The Commonwealth has duly excepted (R., p. 83, pars. 19, 20, 21, 22, 23) to the whole of the third conclusion of the master as to the alleged practical construction of the Treaty and of the grant to Gorham and Phelps by St. 1788, c. 23. This conclusion rests primarily upon detached phrases taken from documents relating:

1. To a settlement with Gorham and Phelps, which *in terms* confined them within the boundaries defined by St. 1788, c. 23.

2. To certain conveyances to Robert Morris of the lands lying *west* of the Phelps and Gorham tract, by definite descriptions, which not only do not include or purport to include any part of the shore or bed of the Lake north of the Phelps and Gorham Purchase, but are absolutely inconsistent with any such intention.

The Treaty, the grant to Gorham and Phelps, and

the five deeds to Morris were all recorded in New York. That record, as matter of law, was a continuing assertion of the title of Massachusetts to that portion of the Treaty tract which was *not* conveyed to Phelps and Gorham or to Morris. The seventh article of the Treaty reads as follows:

> "That no adverse possession of the said lands for any length of time, shall be adjudged a disseizen of the Commonwealth of Massachusetts."

Massachusetts relied, and had a right to rely upon the protection accorded by this provision. It was on record and relieved her from any responsibility to watch and guard *her record title* to that part of the shore and bed of the lake which lay north of the grant to Gorham and Phelps. The master does not suggest that she was aware of any infringement of her rights until just prior to this suit. Indeed, the evidence is plenary that notice of such infringement was not brought to her attention until June 29, 1920 (Plff.'s Ex. 57, R., p. 602). Under these circumstances, the Commonwealth respectfully submits that the conclusion of the master that Massachusetts "acquiesced" in a construction of the Treaty or of St. 1788, c. 23, which would deprive her of that part of the shore and bed of the Lake which lay north of the Phelps and Gorham tract is unwarranted as matter of law.

D. The Conclusion as to Accretions.

It is unquestioned that the tract in dispute is within the boundaries defined by Article II of the Hartford Treaty. In 1803 one William Shepard, acting on behalf of Gorham and Phelps and divers grantees of

Gorham and Phelps, made a survey in which he laid out a portion of the Gorham and Phelps purchase into ranges and townships, including township 2 short range west of the Genesee River. (Stipulation, R., p. 740, par. 3.) This survey is on record in Monroe County. (R., p. 740, par. 3.) The notes embrace the survey by which Shepard laid out the village of Charlotte (now Ward 23 of the City of Rochester) including lots 20 and 21 of said township 2 short range west of the Genesee River. (R., p. 740, par. 3.) These notes are in evidence, and the material portion thereof is printed in the record. (R., pp. 555–557.)

Beginning at a designated point Shepard ran —

"a line N. 28° E. for the center line of a Highway on Main Street 82.25 (82 chains 25 links) *to the shore of Lake Ontario.*" (R., p. 555 bottom.)

Upon each side of this highway which was 1.50 chains wide, he laid out two tiers of twenty lots each, lots 1 to 20, inclusive, lying west of Main Street, and lots 21 to 40 lying east of Main Street between it and the Genesee River. The most northern lot of the western tier he numbered 20, and the most northern lot of the eastern tier he numbered 21.

The westerly line of Main Street and easterly line of the western tier of lots he ran from a marked post N. 28° E. (setting corner posts every 4 chains) "to the post on the N. E. corner of Lot No. 19." The notes then continue:

"From the N. E. corner of Lot No. 19 continued the line being the easterly line of Lot No. 20 5.25 *to the beach of the*

Lake where I set an Elm post mk[d] S. W. No. 20 & S. E. H. from it an ash staddle bears S. 79° W. dist. 0.3 mk[d] 20."

(R., p. 556, top.)

From the S. E. corner of lot No. 1 in the western tier of lots, he ran N. 62° W. 10.00 on the south line of Lot No. 1, and set a marked chestnut post. From this post he ran the western line of the western tier of lots N. 28° E. (setting corner posts every 4 chains) "to a chestnut post mk[d] N. E. No. 20 S. E. No. 19." The notes then continue:

"Continued the line 8.53 *to the beach of the lake* where I set a chestnut post mk[d] S. E. No. 20 from which is an ash tree S 1½° W dist. 0.25."

(R., p. 556 middle.)

The easterly line of Main Street and westerly line of the eastern tier of lots he ran from a designated point marked by a post, N. 28° E. (setting corner posts every 4 chains) "till I came to the north line of Lot No. 22, where I set a post mk[d] S. E. No. 22 & N. E. No. 21." The notes then continue:

"Cont'd the line 5.26 *to the beach* of the Lake and set a B. Ash Post mk[d] S. E. No. 21. S. W. H. from wh an ash tree bears S. 46° W. Dist. O. 25."

(R., p. 556, bottom.)

Shepard then ran a "*Traverse of the Lake Shore* of Lot No. 34", which lay just west of Lot 20 (R., p. 556 bottom) to the chestnut post on the northwest corner of town lot No. 20, and the notes then continued (R., p. 557 top):

"1st C' S. 44½° E. — 10.94 to the W. line of Main Street & S. E. . . . corner of Lot No. 20.

Thence S. 62° E. 1.50 to the East line of Main Street on the Lake Shore.

Then on the Lake Shore of Lot No. 21 from Main Street East Line.

First. C' S. 42. E. — 8.00.

2d. Do. S. 8. E. — 7.00 to the traverse of Genesee River & set a stake being at the N. E. corner of the Township."

The Shepard survey has been the basis of conveyance in this region since it was made. On October 4, 1804, Gorham and Phelps, Sir William Pulteney and others executed a partition deed of sixteen parts (Defts.' Ex. 1, R., p. 624), which conveyed in severalty to Sir William Pulteney, "according to a survey and map of the same made by William Shepard hereunto annexed and to which reference is herein had" (R., p. 625) certain lots in the first and second divisions of Township 2 in the Short Range west of the Genesee River, including town lots 20 and 21, which deed was duly recorded in 1811. (Stipulation, R., p. 739, par. 6, at p. 741.) By divers wills and descents, not here material, said town lots 20 and 21 became vested in the Earl of Craven and one Estcourt (Stipulation, par. 8, R., p. 741).

By warranty deed dated July 21, 1863, the Earl of Craven and said Estcourt conveyed to James M. Wilder and James Whitney said town lot 20 —

"together with all the right, title and interest of the first parties in and to all the land lying north of lot 20 to Lake Ontario."

(Stipulation, par. 13, R., p. 742.)

By mesne conveyances all the right, title and interest of said Wilder and Whitney under this deed became

vested in the Bartholomay Company, Inc., the New York Central R.R. Co., the Bosharts and the McIntyres (Stipulation, par. 14, 16, R., p. 743). These deeds were duly recorded. (Stipulation, par. 19, R., p. 745.)

On August 28, 1868, the Earl of Craven and said Estcourt, by warranty deed, conveyed to Martin McIntyre "building lot No. 21 . . . containing four (4) acres, be the same more or less." (Stipulation, par. 9, R., p. 741.) As his notes show, Shepard laid out the town lots so as to contain 4 acres each, as nearly as might be. By further conveyances, lot 21 became vested, on May 31, 1881, in the New York Central R.R. Co. (Stipulation, pars. 10–13, R., p. 742.)

The north line of lots 20 and 21 was laid out upon the ground by Arthur Vedder, Superintendent of Surveys of the City of Rochester (R., pp. 88, 90–94, Ex. 4, atlas). He first determined the south lines of lots 20 and 21, which defendants do not dispute (R., p. 92). He then laid out the north line of these lots according to the courses and distances in the Shepard notes (R., pp. 92–94).

Shepard, as we have seen, ran the east and west lines of lot 20 and the east line of lot 21 "to the beach of the lake," to marked posts for which in each case Shepard gave cross bearings, thus indicating those posts as termini. The north line of lot 20 is a "traverse of the lake shore", running through these terminal posts, and across the highway to the post which marks the end of the east line of lot 21 "on the lake shore." The north and east line of lot 21 then runs by specified courses and distances "on the lake shore" to a stake on the traverse of the Genesee River which marks the N.E. corner of the Township. *The Shepard survey therefore*

is in precise accord with St. 1788, c. 23, in that it excludes the shore or beach of the lake from the lots surveyed. The premises in dispute lie north of the north line of lots 20 and 21. (Report, p. 53.)

The evidence shows that in 1829 the Federal government projected two piers or jetties at the mouth of the Genesee in order to improve navigation. (See Defts.' Ex. 35, R., p. 667.) These jetties were built out into the lake in the early 30's. As a result, the lake to the west of these piers shoaled up and the beach gradually broadened. Ultimately a bar or ridge formed upon the beach some distance north of the original line where land and water met, and divided from that line by a low lying swampy area through which a creek ran. (Report, pp. 54–55.) In 1884 and 1885 the New York Central Railroad and the Bartholomay Company, which had bought lots 20 and 21 as above noted, filled in the low lying area north of those lots out to and including the bar, thus giving to it the appearance of upland. This was done without the knowledge of Massachusetts *and in the face of the record title* which contained (Stipulation, R., p. 739 *et seq.*):

1. The Hartford Treaty which (a) bounded the tract released and conveyed to Massachusetts, northerly upon the international line (Art. II) and (b) provided that no adverse possession of said lands for any length of time shall be adjudged a disseisin of the Commonwealth of Massachusetts. (Art. VII.)

2. The grant to Gorham and Phelps by St. 1788, c. 23, which bounded the tract conveyed to them upon the shore of the lake, thereby excluding the shore.

3. The Shepard survey which bounded both lot 20 and lot 21 upon the beach of the lake.

4. The partition deed of October 4, 1804, which conveyed lot 20 and lot 21 to Sir William Pulteney in severalty "according to a survey and map of the same made by William Shepard hereto annexed and to which reference is herein had." (The map referred to is a sketch map about 5 by 6 inches on so small a scale that lot lines 4 chains apart are separated about 1/16 of an inch; it contains no boundary data, hence the express reference to the notes.)

5. The deed of July 21, 1863, from the Earl of Craven and Estcourt to Wilder and Whitney, by which lot 20 is conveyed with warranty, and "the land lying north of Lot 20 to Lake Ontario" is quit-claimed only.

The defendants claim the premises in dispute as an accretion to lots 20 and 21. The master advises the court to rule that the additions naturally made to the beach belong to the defendants. (Report, p. 77.) But this ruling depends for its validity upon the two prior advisory rulings of the master to the effect (1) that title to the bed of the Lake was not conveyed to Massachusetts by the Hartford Treaty, (2) that St. 1788, c. 23, conveyed to the water's edge. (Report, p. 77.) It does not seem to be seriously questioned that the defendants cannot claim anything by accretion if they do not bound upon the water itself as distinguished from a boundary upon the shore or beach. If, therefore, these rulings of the master fall, they necessarily carry down with them the advisory conclusion as to accretions.

5. Final Analysis of the Issues.

The principal issues reduce themselves to three questions of law: —

I. Did the Hartford Treaty release and convey to Massachusetts the soil of the bed of Lake Ontario within the boundaries defined by Article II?

II. Did St. 1788, c. 23, bound the tract thereby conveyed to Gorham and Phelps upon the Lake so as to entitle them (or the defendants claiming under them) to accretions?

III. Has the true construction of the treaty or the statute been modified by any practical construction thereof: —

A. By the settlement with Gorham and Phelps?

B. By the sale to Robert Morris of lands lying west of the tract conveyed to Gorham and Phelps by St. 1788, c. 23?

The conclusions of the master do not expressly deal with the claim in the answers: —

I. Of title by adverse possession.

II. Of estoppel.

III. Of laches.

IV. Of rights under the Massachusetts Statute of Limitations.

Presumably he did not consider that any of these claims were sustained. It may be that it is not strictly necessary to deal with them. But out of abundance of caution the Commonwealth will dispose of these claims also.

ARGUMENT.

Point One.

THE HARTFORD TREATY RELEASED AND CEDED TO MASSACHUSETTS TITLE TO THAT PART OF THE BED OF LAKE ONTARIO DESCRIBED IN ARTICLE II.

For about a century prior to the Revolution the Colony of Massachusetts and the Colony of New York claimed both sovereignty over and title to a large territory comprising what is now most of Western New York. This controversy arose under conflicting Royal grants. Apparently the dispute slumbered during the Revolution, but when that war was brought to a victorious close it broke out afresh. An effort was made to have the matter decided by a court constituted by Congress under the Ninth Article of Confederation. (See Treaty-Preamble.) Finally both states appointed commissioners with full power to settle the controversy by agreement. These commissioners met at Hartford, Connecticut, on November 30, 1786, and on December 16, 1786, executed the Hartford Treaty. (Plff. Ex. 1, copied as an appendix to this brief.)

No question as to the validity of this treaty arises, or can arise, in this case. It was executed about two years before the adoption of the Federal Constitution. (See Wharton *v.* Wise, 153 U.S. 155.) The answers of the several defendants admit the due execution and record of the treaty as alleged in the bill. The parties have further stipulated as follows (Rec., p. 739, par. 1).

"The treaty of Hartford was duly entered into by the States of Massachusetts and New York on December 16, 1786. A duplicate original of this treaty is on file in the office

of the Secretary of State of New York, and was recorded in that office on February 2, 1787, in Deeds, Liber 22, page 38. This treaty was duly recorded with Ontario County Deeds on January 3, 1835, in Liber 56, Deeds, page 449. A duplicate original of this treaty is on file in the office of the Secretary of State in Massachusetts, and is printed in Massachusetts Acts, 1786, page 459, *et seq.*"

The treaty has been recorded from time to time in divers counties of New York as a muniment of title. (Rec., p. 612, middle *et seq.*) It has been recognized by the courts of New York as the source of title to the lands comprised within it.

> Ogden *v.* Lee, 6 Hill 546, 548; 5 Den. 628.
> Smith *v.* Rochester, 92 N. Y. 463, 475.
> Johnson *v.* Bell Tel. Co. 186 N. Y. 493, 497.
> Geneva *v.* Henson, 195 N. Y. 447.

It has twice been construed by this court.

> Seneca Nation *v.* Christy, 162 U. S. 283, 284.
> Kennedy *v.* Becker, 241 U. S. 556, 561.

Under these circumstances the treaty is not open either to direct attack, or to emasculation under guise of construction.

Articles I, II and III provide as follows:

"*First.* The Commonwealth of *Massachusetts* doth hereby cede, grant, release and confirm to the State of *New York* forever, all the claim, right and title which the Commonwealth of *Massachusetts* hath to the government, sovereignty, and jurisdiction of the lands and territories so claimed by the State of *New York*, as herein before stated and particularly specified.

Secondly. The State of *New York* doth hereby cede, grant, release and confirm to the Commonwealth of *Massachusetts*, and to the use of the Commonwealth, their grantees, and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property, (the right and title of government, sovereignty and jurisdiction excepted) which the State of *New York*, hath of, in, or to two hundred and thirty thousand and four hundred acres, to be located by the Commonwealth of *Massachusetts*, and to be situate to the northward of, and adjoining to the lands granted respectively to *Daniel Cox* and *Robert Lettice Hooper*, and their respective associates, and between the rivers *Owego* and *Chenengo*. And also, of, in or to all the lands and territories within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of *Pennsylvania*, in the parrallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of *Pennsylvania*, on *Delaware River*, as the said boundary-line hath been run and marked by the Commissioners appointed by the States of *Pennsylvania* and *New York* respectively, and from the said point or place of beginning, running on a due meridian north to the boundary line between the United States of *America* and the King of *Great Britain;* thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the Streight or waters between *Lake Ontario* and *Lake Erie;* thence south along the said meridian, to the south shore of *Lake Ontario;* thence on the eastern side of the said Streight, by a line always one mile distant from and parrallel to the said Streight, to *Lake Erie;* thence due west to the boundary line between the United States and the King of *Great Britain;* thence along the said boundary line, until it meets with the line of cession from the State of *New York* to the United States; thence along the said line of cession, to the northwest corner of the State of *Pennsylvania;* and thence

east along the northern boundary line of the State of *Pennsylvania* to the said place of beginning; And which said lands and territories so ceded, granted, released and confirmed, are parcel of the lands and territories described in the said petition.

Thirdly. The Commonwealth of *Massachusetts* doth hereby cede, grant release and confirm to the State of *New York*, and to the use of the State of *New York*, their grantees and the heirs and assigns of such grantees forever, the right of preemption of the soil from the native Indians, and all other the estate, right, title and property, which the Commonwealth of *Massachusetts* hath of, in or to the residue of the lands and territories so claimed by the State of *New York* as herein before stated, and particularly specified."

The defendants contend, *as a pure matter of construction*, that title to the described portion of the bed of the lake passed to New York as an incident of the sovereignty granted and released by Article I, and did not pass to Massachusetts by the *express* words of Article II. This is emasculation, not construction. To all intents and purposes it strikes from Article II the following words:

"And also of, in or to *all the lands and territories within the following limits and bounds*, that is to say: — . . . and from said point or place of beginning running on a due meridian north *to the boundary line between the United States of America and the King of Great Britain; thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination* of the Streight, or waters between Lake Ontario and Lake Erie; *thence south along said meridian to the south shore of Lake* Ontario," etc. (Italics ours).

As the consideration for the grant and release of sovereignty made to New York by Article I was the lands and territories released to Massachusetts by Article II, together with the further privileges and safeguards accorded by subsequent articles of the treaty to protect the territory so released, it is inadmissible to *construe* this portion of Article II as if the lands thereby conveyed had been bounded upon the edge of Lake Ontario, and not upon the international line which ran through the centre of the lake. The express words of the treaty must receive due effect.

Asakura *v.* Seattle, 265 U. S. 332, 342.
Green *v.* Biddle, 8 Wheat. 1, 89.

It is said that Article II granted and released to Massachusetts only

"the right of preemption of the soil from the native Indians, and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted) which the state of New York hath of, in or to" the lands described;

that this court said in Martin *v.* Waddell, 16 Pet. 367, 410:

"When the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government;"

and that therefore the exception of sovereignty from "all other the estate, right title and property" granted

and released by Article II excluded by implication the title to that part of the described land which lay beneath the waters of the Lake. But this suggestion ignores both the situation of the two states and the nature of the instrument by which the grant and release were made.

Neither Massachusetts nor New York had made good its asserted title either to the sovereignty or to the soil of the tract in dispute. The conflicting claims stood squarely opposed. Each state stood equal in this respect, unless the fact that Massachusetts claimed under the earlier Royal grant in 1620, while New York claimed under a grant made in 1666, gave Massachusetts an advantage. Unlimited as yet by Art. I, Sec. 10, of the constitution, they could make such compact as they chose in order to settle their difference.

Wharton *v.* Wise, 153 U. S. 155.
Rhode Island *v.* Massachusetts, 12 Pet. 657, 725.

Both before and since the constitution conflicting rights as to sovereignty, boundary and navigable waters have been settled by compacts between states.

Howard *v.* Ingersoll, 13 How. 381.
Alabama *v.* Georgia, 23 How. 505.
Devoe Mfg. Co., Petr., 108 U. S. 401.
Central R.R. of N. J. *v.* Jersey City, 209 U. S. 473.
Georgia *v.* South Carolina, 257 U. S. 516.

Such compacts (especially those made prior to the adoption of the constitution) stand upon a broader

foundation than grants to individuals or corporations by statute or otherwise. The exception of sovereignty from "the right of preemption from the native Indians and *all other* the estate, right, title and property" granted and released to Massachusetts by Article II merely preserved intact the grant and release of sovereignty already made by Massachusetts in Article I. It did not enlarge that release. It simply made clear that Massachusetts was to take title and every property interest in the whole tract described, while New York was to have sovereignty over it.

The *property* rights which New York was to receive under the Treaty are defined by Article III which grants and releases to her, in language similar to that used in Article II,

> "the right of preemption of the soil from the native Indians, and all other the estate, right, title and property which the Commonwealth of Massachusetts hath of, in or to *the residue* of the lands and territories so claimed by the State of New York as hereinbefore stated and particularly specified" (in the preamble of the treaty).

The "residue of the lands and territories" so released to New York by Article III manifestly *excluded* "all the lands and territories" described and released to Massachusetts by Article II. Hence Article III released to New York that part of the upland and of the bed of the lake which lay *east* of the meridian drawn from the Treaty corner to the international line, precisely as Article II released to Massachusetts that part of the upland and of the bed of the lake which lay *west* of that meridian. That meridian was not drawn for the purpose of releasing to New York everything

which lay *east* of it by the express words of Article III and of releasing to New York that part of the bed of the lake which lay *west* of it by an *implication* which conflicts with the express words of Article II. If the intention had been to give the whole bed of the lake south of the international line to New York, the lands and territories released to Massachusetts by Article II would have been bounded upon the margin of the lake, not upon the international line.

In seeking so to extend the word "sovereignty" by implication, the defendants overlook the fact that that very sovereignty is qualified by other articles of the Treaty in order to protect the tract released to Massachusetts by Article II. Article IV exempts "from all taxes whatsoever" the lands released to Massachusetts so long as the same remain the property of the Commonwealth. Article VI guarantees to the citizens of Massachusetts "the same and equal rights respecting the navigation and fishing on and in Lake Ontario and Lake Erie" and in the roads and portages between said lakes, as shall from time to time be enjoyed by the citizens of New York. Article VII provides that no adverse possession of the said lands for any length of time shall be adjudged a disseisin of the Commonwealth. Article VIII provides that so long as any part of said lands shall remain the property of Massachusetts New York shall not cede the sovereignty thereof without the consent of Massachusetts. Article IX authorizes Massachusetts and its grantees to hold treaties and conferences with the Indians, relative to the lands so ceded and released, with such armed forces as they shall deem necessary for that purpose. These important qualifications of the sovereignty released by

Article I and excepted from Article II, which are manifestly inserted to protect Massachusetts in its ownership of the lands and territories ceded and released by the latter article, rebut any implied extension of the word "sovereignty" which in any manner narrows the description and extent of the lands so released to Massachusetts. Indeed neither Article I nor Article II purport to cede or release *any* lands *to New York*. The lands ceded and released to New York, which include not only the upland but also a part of the bed of the lake, are defined by Article III, which includes only the "residue of the lands and territories" which remains after the description in Article II is fully satisfied. The *express* grant to New York in Article III excludes any *implied* grant to New York of any part of the lands described and released to Massachusetts by Article II.

In Green *v.* Biddle, 8 Wheat. 1, this court disposed of a similar contention touching the compact between Virginia and Kentucky in the following words (p. 89):

> "We pass over the other observations of counsel upon the construction of this article with the following remark: that where the words of a law, treaty or contract have a plain and obvious meaning all construction in hostility to such meaning is excluded.
>
> . . . . . .
>
> Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient or even pernicious to the state in some other respect? The court cannot see how this proposition can be maintained."

Indeed, if the plain words of Article II, bounding the tract thereby released to Massachusetts upon the in-

ternational line and not upon the margin of the lake were susceptible of a restricted construction which would confine the tract conveyed south of the latter line (which is clearly not the fact), that restrictive construction is not to be adopted. As was said in Asakura *v.* Seattle, 265 U. S. 332, 342:

> "Treaties are to be construed in a broad and liberal spirit, and when two constructions are possible, one restrictive of the rights that may be claimed under it, and the other favorable to them the latter is to be preferred."

As we have before pointed out the only consideration for the release by Massachusetts of her claim to sovereignty by Article I, and for her release by Article III of the "residue" of the lands claimed was the release to her of the tract described in clear and unequivocal words by Article II, and the further qualifications placed upon that sovereignty by subsequent articles of the treaty for the protection of her title to that territory. If an honest construction "restrictive" of the rights conferred by Article II is to be rejected, what is to be said for a pretended "construction" which strikes out a portion of that description altogether in order to substitute for the northern boundary upon the international line for which that article *expressly* calls, a boundary upon the margin of the lake for which that article does *not* provide?

Each of the defendants admittedly claims under and through that Treaty. The "sovereignty" upon which New York relies in order to claim title to the bed of the Lake was released to her by Article I. The other defendants claim title to their lands through Massachusetts under Article II. (Stipulation, Rec., p. 739.)

The defendants cannot, if they would, directly attack the validity of any part of the instrument under which they claim.

> Daniels *v.* Tearney, 102 U. S. 415, 421.
> Gibson *v.* Lyons, 115 U. S. 439, 447.
> Keller *v.* Ashford, 133 U. S. 610, 620.
> Grand Rapids Ry. *v.* Osborn, 193 U. S. 17, 29.
> Wall *v.* Parrott, etc., Co. 244 U. S. 407, 412.

As was said in Gibson *v.* Lyons, *supra* (p. 447):

> "He certainly cannot be permitted to claim under and against the same deed; to insist on its efficacy to confer a benefit, and repudiate a burden with which it has qualified it; to affirm a part and reject a part."

If they cannot directly assail the validity of that part of Article II which expressly bounds the tract released to Massachusetts upon the international line, they cannot indirectly repudiate it by "construing" it out of the Treaty. An unduly narrow construction of a contract is an impairment and repudiation of it.

Within five years of the Treaty Massachusetts, to the knowledge of New York but without any protest from that State, unequivocally asserted her title to the bed of the lake within the boundaries defined by Article II of the Treaty. After the default of Gorham and Phelps, and the execution of the Indenture of June 9, 1790, (Deft's Ex. 31, Rec., p. 635), which confined them within the boundaries defined by St. 1788, c. 23, the legislature by Res. 1790, c. 121, approved March 8, 1791, authorized a committee to bargain and sell to Samuel Ogden the lands described

in that resolve. (Deft's Ex. 31 A., Rec., p. 644.) On March 12, 1791, that committee, by an agreement under seal, covenanted to convey to Ogden for £100,000 (Rec., p. 652, 653–654):

" . . . the pre-emptive, and all other right and title which the said Commonwealth of Massachusetts hath to the premises which are bounded and described as follows — to wit — All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie; and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east from the northern termination of said streight or waters, and which premises to be conveyed, are to extend on the line of said tract belonging to the state of New York to the south shore of Lake Ontario, then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending untill a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth of Massachusetts by an Act of the Legislature thereof passed the twenty first day of November, Seventeen hundred and eighty-eight. And the said premises to be bargained & sold as aforesaid by virtue of the powers, contained in Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so upon that line westwardly to the place of beginning where that line meets the tract lately ceded by the said United States to the said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof, . . . "

On May 11, 1791, Ogden assigned all his rights to Robert Morris (Rec., p. 656–657), the committee upon the same day executed and delivered a deed to Morris, (Deft's Ex. 32, Rec., p. 646), which expressly refers to the Indenture of March 12, 1791, (Rec., p. 647), and which, in consideration of £45,000 conveyed to Morris: —

" . . . the pre-emptive right & all other right title & interest which the said Commonwealth hath to a certain tract or parcel of land being part of the Territory above described, which parcel contains about Five hundred thousand Acres more or less & is bounded as follows to wit. Westerly by a Meridian line drawn from a point on the North Line of the State of Pennsylvania twelve miles west of the South west corner of the Land confirmed to Nathaniel Gorham & Oliver Phelps to the Line in Lake Ontario which divides the Dominion of the King of Great Britain & the United States, Northerly by said dividing line easterly by the Land confirmed to Nathaniel Gorham & Oliver Phelps by the Legislature of the Commonwealth of Massachusetts by An Act passed November the twenty-first One thousand seven hundred & eighty-eight & Southerly by the said North line of the State of Pennsylvania, reserving out of the same granted premises one undivided sixtieth part thereof."

This deed was recorded, as required by Article XI of the Treaty, with the Secretary of State of New York, on August 17, 1791. (Rec., p. 648.)

On May 11, 1791, the same committee made four other deeds to Morris (Rec., pp. 657–666) by which, in consideration of £15,000 each for the first three tracts, and of £10,000 for the fourth or most western tract, they conveyed the balance of the land described in the indenture of March 12, 1791, in four tracts of

800,000 acres each. Each deed refers to that indenture and in each the north boundary of the tract by it conveyed is "the dividing line between the United States and the dominion of the King of Great Britain." (Rec., pp. 658, 660, 663, 665.) These deeds were placed in escrow but were likewise recorded with the Secretary of State of New York, Liber 23, page 232. New York manifestly knew from the required record with its Secretary of State of this assertion by Massachusetts of her title to that part of the bed of Lake Ontario embraced within the boundaries defined by Article II of the Treaty. As New York made no objection or protest, these deeds are a true practical construction of that article which precludes New York from now asserting, over a century and a quarter later, that that article should be "construed" as if it had bounded the "lands and territories" released and conveyed to Massachusetts upon the margin of the lake. The individual defendants are of course bound by Article II of the treaty, not only because they claim under it through Gorham and Phelps, but also because such compacts bind both the contracting states and their inhabitants.

Poole *v.* Fleeger, 11 Pet. 185, 210.
Rhode Island *v.* Massachusetts, 12 Pet. 657, 725.

As was said in Poole *v.* Fleeger, *supra*, p. 210:

> "The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both States."

Nor can either New York or the Bartholomay Company found any rights upon the patent issued to that

company in 1888 (Deft's Ex. 46, Rec., p. 700). The Hartford Treaty is a contract within the meaning of U. S. Const. Art. 1, sec. 10.

Green *v.* Biddle, 8 Wheat. 1.

The adoption of the Constitution ended any possible right of New York to impair that Treaty. As that patent plainly conflicts with the grant made by Article II of the Treaty it is void as an "impairment" thereof.

Fletcher *v.* Peck, 6 Cranch. 87.
Tiffany *v.* Oyster Bay, 209 N. Y. 1.

Any claim of adverse possession based upon this patent is squarely met by Article VII of the Treaty, which, as Poole *v.* Fleeger, 11 Pet. 185, 210, holds, is binding upon New York and the citizens thereof. As this patent did not come to the knowledge of Massachusetts prior to 1920 (Report, p. 48), any claim of estoppel or acquiescence falls likewise. On the other hand the record of the Treaty, of the statutory grant to Gorham and Phelps, of the Shepard Survey, of the partition deed of 1804 and of the Craven and Estcourt deed to Whitney and Wilder (see Stipulation, Rec., p. 739, pars. 1, 3, 5, 6, 13) were as matter of law notice to the Bartholomay Company, and those later claiming under it, of the title of Massachusetts to the premises described in the patent.

The Commonwealth therefore submits that the advisory ruling of the master that Article II of the treaty did not convey title to any part of the bed of the lake is erroneous as matter of law; the court should rule that Massachusetts took title to all the lands and territo-

ries therein described, including that part of the bed of the lake embraced within the express words of the description.

Point Two.

THE DEFENDANTS HAVE NOT ESTABLISHED ANY TITLE TO THE LOCUS BY ACCRETION.

1. The Burden is on the Defendants to Prove Title by Accretion.

The Bartholomay Company and certain other defendants are the record owners of town lot 20 as surveyed in 1803 by William Shepard, and the New York Central R.R. is the record owner of lot 21. The premises in dispute lie north of those lots as surveyed by Shepard, and so were part of the shore or bed of the lake at the time of that survey. The shore and bed of the lake, as well as the upland, were ceded and released to the Commonwealth by Article II of the Hartford Treaty. The defendants allege in their answers that they have acquired title to the locus by accretion. The burden is on them to prove that allegation, for as was said in Oklahoma *v.* Texas, 260 U. S. 606, 638:

> "The party asserting material changes should carry the burden of proving them, whether they be recent or old."

If they fail, the title acquired by Massachusetts under the Hartford Treaty stands unshaken and unimpaired.

II. Accretions Belong to that Land which Bounds upon and is in Contact with the Water.

A. Only Land which is in Contact with the Water can gain by Accretion.

Pollard's Lessee *v.* Files, 2 How. 591, 607.
*Jones *v.* Johnston, 18 How. 150; 1 Black 209, 221.
*Bates *v.* Illinois Cent. R.R. Co., 1 Black 204, 208.
*Banks *v.* Ogden, 2 Wall. 57, 69.
Saulet *v.* Shepard, 4 Wall. 502, 508.
The Schools *v.* Risley, 10 Wall. 91.
St. Clair *v.* Lovingston, 23 Wall. 46, 68.
Potomac S. Co. *v.* Upper Potomac Co., 109 U. S. 672, 681–2.
Morris *v.* United States, 174 U. S. 196.
*Axline *v.* Shaw, 35 Fla. 305.
Stockport W. Co. *v.* Potter, 3 Hurl. & C. 300, 326.
*Bristol *v.* Carroll County, 95 Ill. 84, 90.
*Miller *v.* Commissioners, 278 Ill. 390.
Sweringen *v.* St. Louis, 151 Mo. 348, 355.
Ocean City Hotel Co. *v.* Sooy, 77 N. J. L. 527.
*Cook *v.* McClure, 58 N. Y. 437.
People *v.* Colgate, 67 N. Y. 512.
Trustees of East Hampton *v.* Kirk, 84 N. Y. 215, 219.
*People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597.
Slauson *v.* Goodrich T. Co., 94 Wis. 642.

* *Note.* — The starred cases relate to the Great Lakes or ponds. We select a few typical cases.

In Jones *v.* Johnston, 18 How. 150, certain accretions made by Lake Michigan were claimed by the respective owners of lots 34 and 35 in Kinzie's addition. There was a verdict for the owner of lot 34. The question was whether that lot touched the water at the time when it was conveyed by Kinzie. In holding certain instructions erroneous, the court said, by Nelson, J. (p. 157):

"The jury, therefore, in this case, should have been directed to inquire whether or not, at the time of the deed to the plaintiff, lot No. 34 *had a waterline upon the lake* north of the north pier of the Chicago harbor; — in other words, whether the line between that lot and No. 35 struck the shore of the lake before it reached this pier. If it did, then the question would properly arise in respect to its right to a share of the alluvial accretions formed since that period. *If it did not, then no question of the kind could arise in the case.*" (Italics ours.)

On retrial of this case (1 Black 209), the court held that the judge rightly instructed the jury that the question was whether, at the date of conveyance from Kinzie to Johnston, "lot 34 had a *water front*, at that time, north of the north pier" (p. 221).

So in Bates *v.* Illinois Central R.R. Co., 1 Black, 204, 208, in holding that as matter of law a certain claim to accretions in Lake Michigan could not be sustained, the court said:

"Before a proprietor can set up his claim to accretions and the like, *he must first show that he owns the shore;* and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless." (Italics ours.)

In Banks *v.* Ogden, 2 Wall. 57, a small triangle of land intervened between defendant's land and the edge of Lake Michigan, to which triangle additions were made by accretion (see map, p. 59). In holding that these accretions belonged to the plaintiff as owner of the triangle, which touched the water, and not to the defendant, who owned the land behind, the court said (p. 67):

"The rule governing additions made to land, *bounded by a river, lake, or sea*, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, *thus bounded*, is entitled to these additions. . . .

There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land *bounded by the lake*. The controversy turns on ownership." (Italics ours.)

The court then held that by the deed to defendant, title to the triangle in question remained in K. and did not pass to defendant, but passed subsequently to plaintiff, and said (p. 69):

"The title to the accretion, thus made, followed the title to the land (triangle) and vested in the assignee."

So in Saulet *v.* Shepard, 4 Wall. 502, 508, the court, in holding that one who conveyed a strip of alluvion bounding on the river, lost the right to further accretions, said (p. 508):

"The right to alluvion depends upon *the fact of the contiguity of the estate to the river*. Before there can be a right to accession or accretion, there must be an estate to which the accession can attach." (Italics ours.)

In St. Clair *v.* Lovingston, 23 Wall. 46, in holding that where a United States patent to two lots, bounded one by a line *which coincided with the water line* and ran "to a point in *the river*", and the other was expressly described as "binding" on the river, the lots were in contact with the river and entitled to accretions, the court said (p. 68):

"In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly *made by the water to which the land is contiguous.*" (Italics ours.)

In Bristol *v.* Carroll County, 95 Ill. 84, the defendants claimed the premises in dispute as an accretion to lands owned by them. In affirming a judgment for the plaintiff, upon the ground that defendants bounded upon a section line, and not upon the lake, the court said (p. 90):

"To entitle them (defendants) to set up such a claim (accretion), *of course the lake must be the west boundary of their land.*"

In Miller *v.* Commissioners, 278 Ill. 390, the court held that where a street is laid out along the lake partly upon land bounding on Lake Michigan and partly on land under water, it cuts off the right to future accretions.

In People *ex rel.* Banks *v.* Colgate, 67 N. Y. 512, a strip from 3 to 11 feet wide, lying between the lot and the water, was held to cut off all riparian right.

In People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, the court, in holding that land extending only to *the beach of Lake Ontario* was not in contact with the water

and had no riparian right or right to accretions, said, by Ruger, C.J. (p. 606):

"Neither can it be doubted but that a riparian owner conveying lands adjacent to navigable waters, may so limit his grant as to reserve to himself not only his riparian privileges in the water, but also subsequent accretions to the soil formed by the operation of natural causes. This follows necessarily from the absolute right which the owner has to impose such terms and conditions on his grants as he may deem necessary or proper. *Whatever may have been the motive or however inconsiderable may have been the right ungranted, the only inquiry here is whether any land next the lake remained unconveyed by the deeds of 1873.* (People *ex rel.* Banks *v.* Colgate, *supra*) . . .

The undisputed evidence in the record shows that there was a strip of land of varying depth, from thirty feet and upwards, lying between the lake and the rectangle described in the deed of 1873 at the time of the hearing before the commissioners. Whenever this land was formed, and whether it existed to its full extent, at the time of the conveyance of 1873, or not, we think is immaterial, *as all accretions to the shore enured to the benefit of that person who owned the land adjacent to the water,* and he alone, if any, was entitled to the grant from the commissioners under the statute." (Italics ours.)

In Slauson *v.* Goodrich Transportation Co., 94 Wis. 642, the court, after finding as a fact that an irregular strip of land intervened between defendant's eastern boundary and the low water mark of Lake Michigan, held that the defendant was not entitled to accretions to that strip.

The defendants claim under and through the grant made to Gorham and Phelps by St. 1788, c. 23. Unless they establish that that act bounded the premises

conveyed *upon the lake* they fail to establish the fundamental condition upon which any right to accretions depends, namely, that they are in contact with the water.

Jones *v.* Johnston, 18 How. 150, 157.
Bates *v.* Illinois, 1 Black 204, 209.
Banks *v.* Ogden, 2 Wall. 57.
Axline *v.* Shaw, 35 Fla. 305.
People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597.
Cook *v.* McClure, 58 N. Y. 437.
People *ex rel.* Banks *v.* Colgate, 67 N. Y. 512.
Bristol *v.* Carroll County, 95 Ill. 84.
Miller *v.* Commissioners, 278 Ill. 390.
Sweringen *v.* St. Louis, 151 Mo. 348, 355.
Slauson *v.* Goodrich T. Co. 94 Wis. 642.

III. The Law of Massachusetts Determines what Physical Boundary is called for by St. 1788, c. 23, while the Law of New York Determines whether or not that Physical Boundary is, or is not, in Contact with the Water.

In determining whether any given instrument does or does not bound the tract conveyed upon the water, two questions arise. In the first place, what physical boundary is called for by that instrument? In the second place, what incidents does the law of the place where the land lies attach to the physical boundary so defined? In the case at bar the instrument of conveyance to Gorham and Phelps (under whom the individual defendants claim title to lots 20 and 21) is a *Massachusetts* statute, namely, St. 1788, c. 23. That statute calls for "the shore of the Ontario Lake" as the terminal monument of the western boundary

of the tract conveyed, and draws the northern boundary "thence eastwardly along the shores of said Lake." The first question is upon what physical line did the Legislature of Massachusetts bound the tract? Was it upon the high water mark, or the low water mark? Or to put the question another way, was it upon the beach or upon the lake? That preliminary question as to the construction of a Massachusetts statute is a question of Massachusetts law to be determined in the light of the Massachusetts decisions, which this court accepts as conclusive upon that subject.

Wolff Packing Co. *v.* Industrial Court, 267 U. S. 552, 562.
Hancock *v.* City of Muskogee, 250 U. S. 454, 456.
American Mfg. Co. *v.* St. Louis, 250 U. S. 459, 462.
25 C. J. 833, note 73.

Having determined the question as to what physical monument or boundary is called for by the act the question would then become whether, under the New York decisions, that line is or is not in law in contact with the water.

Shively *v.* Bowlby, 152 U. S. 1.
Hardin *v.* Shedd, 190 U. S. 508.
McGilvra *v.* Ross, 215 U. S. 70.
Arkansas *v.* Tennessee, 246 U. S. 158.
Port of Seattle *v.* Oregon, 255 U. S. 56.

For example, if a Massachusetts deed called by some appropriate description for the sea as a boundary of the tract conveyed, that deed, as applied to New York

land, would convey to ordinary high water mark, and as applied to Massachusetts land, would convey to ordinary low water mark.

Shively *v.* Bowlby, 152 U. S. 1.

So if a Massachusetts deed called by some appropriate description for the "shore of the sea" as the boundary of the tract conveyed, that deed would convey to ordinary high water mark in both States — the result being that in New York that line would be in law in contact with the water, while in Massachusetts it would not be in law in contact with the water, the line of contact with the sea in the latter State being fixed at low water mark by the Ordinance of 1641–47.

Shively *v.* Bowlby, 152 U. S. 1.

In other words, the physical nature of the boundary called for by Mass. St. 1788, c. 23, is to be determined by construing that act in the light of the Massachusetts decisions, while the legal incidents flowing from the nature of the physical boundary so ascertained depend upon and are determined by the law of New York, in which the land lies.

IV. The Law of New York as to what Boundaries are in Contact with the Water.

In New York the question whether a given boundary is in law in contact with the water depends upon the given boundary and the nature of the water.

A. The Sea.

A deed calling for the sea as a boundary conveys to the ordinary high water mark.

Shively *v.* Bowlby, 152 U. S. 1, 20–21.
Sage *v.* Mayor of New York, 154 N. Y. 61.
Matter of Mayor of New York, 182 N. Y. 361.
Nevins *v.* Friedauer, 198 App. Div. 250.

On the other hand, a boundary upon the cliff or beach is not a call for the sea and does not define a line in contact with the water.

Trustees of Easthampton *v.* Kirk, 84 N. Y. 215.

B. Navigable Lakes.

A grant which bounds the premises conveyed upon a *navigable* lake conveys to low water mark.

Stewart *v.* Turney, 237 N. Y. 117.
Champlain & St. L. R. R. *v.* Valentine, 19 Barb. 484.
People *v.* Canal Commissioners, 5 Wend. 423, 446.
Wheeler *v.* Spinola, 54 N. Y. 377, 385.

On the other hand, a boundary upon the beach, upon the shore or upon high water mark of a *navigable* lake does not convey to the edge of the water or confer riparian rights.

People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, 606.
Geneva *v.* Henson, 195 N. Y. 447, 462.

New York Central & H. R. R.R. Co. *v.* Moore, 137 App. Div. 461, affirmed 203 N. Y. 615.
Cook *v.* McClure, 58 N. Y. 437.
Sloan *v.* Biemiller, 34 Oh. St. 492.
Axline *v.* Shaw, 35 Fla. 305.

Intimations in People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, 606, and Matter of the City of Buffalo, 206 N. Y. 319, 324, that the line of contact with the waters of a *navigable* lake is high water mark, were overruled in Stewart *v.* Turney, 237 N. Y. 117, 125–126, 129.

C. Navigable Rivers.

A boundary upon a *navigable* river, above the point where the tide ebbs and flows, conveys only to the water's edge and includes no part of the bed.

Danes *v.* New York, 219 N. Y. 67.
Fulton L. H. & P. Co. *v.* New York, 200 N. Y. 400, 413.
People *v.* Canal Appraisers, 33 N. Y. 461.
Tibbetts Case, 5 Wend. 423; 13 Wend. 355; 17 Wend. 571; 19 N. Y. 523.

D. Non-Navigable Rivers and Small Ponds.

A grant bounded upon a *non-navigable* stream, or upon a *small* lake or pond which is susceptible of private ownership, passes title to the thread of the stream, or to the centre of the pond or little lake as the case may be.

Fulton L. H. & P. Co. *v.* New York, 200 N. Y. 400 (stream).
Calkins *v.* Hart, 219 N. Y. 145 (pond).

Gouverneur *v.* National Ice Co., 134 N. Y. 355 (pond).
Smith *v.* Rochester, 92 N. Y. 463 (small lake).

On the other hand, a boundary upon the bank or margin of a *non-navigable* stream *restricts* the conveyance to low water mark even though the grantor might have conveyed to the thread of the stream.

Child *v.* Starr, 4 Hill 369; 5 Denio 599.
Babcock *v.* Utter, 1 Abb. Ct. of App. 27.
Halsey *v.* McCormick, 13 N. Y. 296.
Matter of the City of New York, 212 N. Y. 328.

The Commonwealth calls attention to the clear and sharp distinctions flowing from the nature of the boundary specified, and the nature of the water drawn in question, because the master in construing this Massachusetts statute has ignored the settled rule in Massachusetts that the words "to the shore and along the shore" do *not* convey to low water mark; and the cases in New York and other States which hold that a boundary upon the *shore* of a *navigable lake* does *not* convey to the water's edge; and has *extended* the tract conveyed by Mass. St. 1788, c. 23, to the line where land and water meet upon the strength of New York cases which hold that a boundary upon the *bank* of a *non-navigable stream restricts* the conveyance to the low water mark of the stream, although a boundary upon the stream itself would convey to the thread of it (Report, pp. 66–72; 76–77).

V. The Grant to Gorham and Phelps.

On April 1, 1788, Res. 1787, c. 135 (p. 900) was approved (Plff's Ex. 3, R., p. 598, see also Report, p. 18). This resolve, omitting the title, reads as follows:

"On the proposal made to the General Court by the honorable Nathaniel Gorham and Oliver Phelps, esquires, to purchase for the consideration of three hundred thousand pounds in consolidated securities of this Commonwealth, or two thousand pounds specie together with two hundred and ninety thousand pounds in like securities, the right of pre-emption which this Commonwealth has in and to the Western Territory, so called, lately ceded by the State of New York to this Commonwealth as appears by deed executed by their respective Commissioners at Hartford the 16th day of December, A.D. 1786.

Resolved, that the said proposal for purchasing the Land aforesaid for the consideration of three hundred Thousand pounds in consolidated securities of this Commonwealth be and hereby is accepted.

And this Commonwealth doth hereby agree to grant, sell and convey to the said Nathaniel Gorham and Oliver Phelps Esquires all the Right Title and demand which the said Commonwealth has in and to the said Western Territory by the Deed of Cession aforesaid. To have and to hold the same to the said Nathaniel Gorham & Oliver Phelps Esquires their heirs and assigns forever upon the Conditions hereafter expressed; and the said Nathaniel Gorham and Oliver Phelps are hereby authorized to extinguish by purchase the Claims of the Native Indians holding the fee or right of Soil in the Territory aforesaid. And it is hereby

Resolved that the Reverend Mr. Samuel Kirkland be and hereby is appointed to superintend and approve at the Expence of the said Grantees the purchase which the said Nathaniel Gorham and Oliver Phelps Esquires shall make of the Claims of such Native Indians. And it is hereby further

Resolved that all such purchases as the said Nathaniel Gorham and Oliver Phelps shall make of the Claims of the said Indians in presence of the said Superintendent shall be confirmed by this Commonwealth, provided the said Gorham and Phelps shall give security to the Satisfaction of the Supreme Executive of this Commonwealth seperate obligations to pay the aforesaid consideration monies to the Treasurer of this Commonwealth or his successor in Office for the use of this Commonwealth, one third thereof in one year, one other third thereof in two years and one other third thereof in three years from the date of this Resolve with interest in like consolidated securities to commence from the date of this Resolve until paid."

This resolve is an agreement to convey, provided that Gorham and Phelps comply with the terms and conditions therein expressed. The effective act of conveyance is St. 1788, c. 23, approved November 21, 1788, after Gorham and Phelps had extinguished the Indian claim to a part of the Treaty lands, by a deed procured from the Indians on July 8, 1788, and laid that deed before the Legislature as the basis of the grant made by St. 1788, c. 23. The resolve of April 1, 1788 (Res. 1787, c. 135) and the Act of November 21, 1788 (St. 1788, c. 23) were both set out and exemplified in one instrument which, as required by Article XI of the Treaty, was recorded on February 6, 1789, with the Secretary of State of New York (R., p. 601), and also in Ontario County (R., p. 602) from which Monroe County was later set off (R., p. 745, par. 20).

On July 8, 1788, Oliver Phelps, in consideration of £2100, and of a covenant of even date, executed by him on behalf of himself and Gorham, procured from the Five Nations (Mohawks, Oneidas, Onandagas, Cayugas and Senecas) a warranty deed (Plff's Ex. 2,

R., p. 595) which extinguished the Indian claim to a tract described as follows:

"all that territory or Country of land lying within the State of New York contained within & being parcel of the lands and territory, the right of pre-emption of the soil whereof from the native Indians was ceded by the State of New York aforesaid to the Commonwealth aforesaid by Deed of Cession executed at Hartford by Commissioners for that purpose on the sixteenth day of September in the year of our Lord One thousand seven hundred and eighty six within the following limits and bounds; that is to say: Beginning in the north boundary line of the State of Pennsylvania in the parallel of forty two degrees north latitude at a point distant eighty two miles west from the north east corner of Pennsylvania on Delaware river as the said boundary line hath been run and marked by the Commissioners, appointed by the States of New York & Pennsylvania respectively, and from said point or place of beginning, running west upon said line to a meridian which will pass through that corner or point of land made by the confluence of the Thanahasgwaikon Creek so called with the waters of the Genesee river thence running north along the said meridian to the corner or point last mentioned thence northwardly along the waters of the said Genesee river, to a point two miles north of Thanawageras village, so called, thence running in a direction due west twelve miles, thence running in a direction northwardly, so as to be twelve miles distance from the most westward bends of said Genesee river to the shore of the Ontario Lake thence eastwardly along the shores of said Lake to a meridian which will pass through the first point or place of beginning above mentioned, thence south, along said meridian to the first point or place of beginning aforesaid, together with all and singular the woods, houses, streams, rivers, ponds, lakes, upon, within, and in any wise appertaining to said territory, to have and to hold, the above granted and bargained premises, together with all

the appurtenances and privileges thereunto belonging or in any wise appertaining, to them the said Oliver Phelps and Nathaniel Gorham and to their heirs and assigns forever: An- we the underwritten Sachems, Chiefs, and Warriors do hereby covenant and engage to and with the said Oliver Phelps, Nathaniel Gorham and their heirs, executors and administrators, that we will Warrant and defend the above granted and bargained premises to them the said Oliver, Nathaniel and their heirs & assigns against all claims whatsoever."

To this deed is appended the following certificate of Kirkland (R., p. 598):

"Pursuant to a Resolution of the Legislature of the Commonwealth of Massachusetts passed March 30th, 1788, I have attended a full and general treaty of the five nations of Indians at the chief Village in their territory on Buffalo Creek, alias Teyoheghalotea, when the foregoing instrument, or deed of conveyance made to the honorable Nathaniel Gorham & Oliver Phelps Esqrs. of a certain part of the lands belonging to the said five nations the discription and boundaries thereof being particularly specified in the same, was duly executed, signed, sealed, and delivered in my presence by the Sachems Chiefs and warriors of the above mentioned five nations, being fairly and properly understood & transacted by all the parties of Indians concerned, and declared to be done to their universal satisfaction and content: And I do therefore hereby certify and approve of the same."

This deed of course conveyed no title to the tract therein described. The Indians had no title to the soil which they could convey.

Johnson *v.* McIntosh, 8 Wheat. 543.
Southampton *v.* Mecox Bay O. Co. 116 N. Y. 1.

It simply extinguished the Indian claim to the described tract.

In employing this deed to the tract described certain facts should not be forgotten. Lake Ontario lies considerably below the level of the upland. Along most of the lake high bluffs slope quite sharply to beaches of considerable width which divide the base of the bluffs from the water. At the locus in dispute the slope is more gentle because of the river, but east and west of it steep bluffs stretch as far as the eye can see. Lake Ontario was the best known of all the Great Lakes. Oswego, situated at the mouth of the Oswego River some distance east of the Treaty tract, was a considerable trading post even before the French and Indian War, and was captured by the French under Montcalm in August, 1756. There is no reason to believe that the general physical characteristics of the tract embraced in this deed were unknown to Phelps. It is very unlikely that he and Gorham were buying a pig in a poke. If, as seems probable, Phelps drew the Indian deed himself (neither Kirkland nor the Indians would have had sufficient knowledge of conveyancing to do so) he shows in the careful and accurate description of the western boundary a thorough knowledge of the physical geography of the region.

The premises described embrace about one third of the Treaty tract. The draftsman of the Indian deed evidently had a copy of the Hartford Treaty before him. The point of beginning is described in the words of the Treaty. The east and south boundaries are drawn upon the east and south boundaries of the Treaty tract. The west and north lines are drawn in order to

exclude that part of the Treaty tract which lies west and north of those boundaries.

Every course of the west line is defined by or in reference to the Genesee River or to "the waters of the Genesee River". The first course of the western line is

"a meridian which will pass through that corner or point of land made by the confluence of the Thanahasgwaikon Creek, so called *with the waters of the Genesee River;*"

The next course of the western line runs

"thence northwardly *along the waters of the said Genesee River* to a point two miles north of Thanawageras Village so called;"

The next course of the western line is

"thence running in a direction due west twelve miles" (*i.e.*, a line whose eastern terminus is fixed by the waters of the river);

The final course of the west line is

"thence running in a direction northwardly so as to be twelve miles distant from the *most westward bends of said Genesee River* (*i.e.*, a line whose direction is determined by the direction of the river) *to the shore of the Ontario Lake;*"

The north line runs

"thence eastwardly *along the shores of said Lake* to a meridian which will pass through the first point or place of beginning above mentioned."

Kirkland's certificate declares that this deed or conveyance

"of a certain part of the lands belonging to said five nations, *the description and boundaries thereof being particularly specified*

in the same . . . being fairly and properly understood & transacted by all the parties of Indians concerned. . . . I do therefore hereby certify and approve of the same." (R., p. 598.)

If the boundaries "particularly specified" in this instrument were "fairly and properly understood & transacted by all the parties of Indians concerned" they were not less intelligently understood and transacted by Oliver Phelps. There can be no question that he was content to accept a deed which contrasts in the most emphatic manner a western boundary whose every course is defined by or in reference to *the waters of the Genesee River* with the call for a terminal monument and northern boundary which is neither the lake nor the waters of the lake, *but the shore of the lake*. In determining whether this instrument was intended to convey the upland only and so to exclude the beach and bed of the lake, or whether it was intended to convey to the water's edge and so to include the beach, we may well ask ourselves the question put by the court in Oyster Bay *v.* Stehli, 169 App. Div. 257, 263, in regard to a similar Indian deed:

"Moreover, if the Indians intended to convey to the water, what more natural than to name the Sound as the northern boundary? Why ignore the greatest monument which nature had placed before them if that was intended to be the limit?"

It is of little moment whether Phelps, as seems likely, drew this deed, or whether he and Gorham simply accepted it as a correct description of the tract within which they had extinguished the Indian claim. They laid it before the Legislature and asked confirma-

tion of their purchase by the description contained in it. The third recital of St. 1788, c. 23 (R., p. 600) reads as follows:

"And whereas, the said Nathaniel Gorham & Oliver Phelps by virtue of authority derived from the aforesaid Resolve, have by deed, from the Sachems Chiefs and Warriors of the five Nations of Indians bearing date the eighth day of July last, purchased the claims of the Native Indians to the Fee or Right of Soil in part only of the said Lands as contained within the descriptions of the said Deed hereafter inserted which purchase appears to have been made under the Superintendence prescribed and in the manner intended by the aforesaid Resolve."

As the Indian deed conveyed no title, St. 1788, c. 23, is the effective instrument of conveyance. The third recital leaves no question that the statute conveys by a description furnished, adopted and requested by the grantees. For that reason the language of it must be construed most strongly against them. As was said by this court in Insurance Companies *v.* Wright, 1 Wall. 456, 468:

"The rule is that when in such cases the language requires construction, it shall be taken most strongly against the party making the instrument."

Garrison *v.* United States, 7 Wall. 688,690.

The statute is a grant by Massachusetts to two of its citizens. Such grants are always construed in favor of the state and against the grantees; nothing can be inferred against the state.

Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 424.

Mills *v.* St. Clair County, 8 How. 569, 581.
Slidell *v.* Grandjean, 111 U. S. 412, 437.
United States *v.* Oregon etc. R.R., 164 U. S. 526, 539.
Caldwell *v.* United States, 250 U. S. 14, 20.
Attorney General *v.* Boston, 123 Mass. 460, 469.
Proprietors of Mills *v.* Commonwealth, 164 Mass. 227, 233.
Stoneham *v.* Commonwealth, 249 Mass. 112, 117.
People *v.* New York & S. I. F. Co., 68 N. Y. 71, 77.
Syracuse W. Co. *v.* Syracuse, 116 N. Y. 167, 178.
DeLancey *v.* Piepgras, 138 N. Y. 26, 38.

The rule is tersely stated by Chief Justice Fuller in United States *v.* Oregon, etc., R.R., 164 U. S. 526, 538:

"The rule of construction applicable to the granting act is the familiar rule that all grants of this description must be construed favorably to the government, *and that nothing passes but what is conveyed in clear and explicit language.*" (Italics ours.)

So also in Stoneham *v.* Commonwealth, 249 Mass. 112, 117, Rugg, C.J., stated the rule thus:

"It is a general principle that 'a grant from the sovereign power is to be construed strictly against the grantee. Nothing will be included in the grant except what is granted expressly or by clear implication.' Attorney General *v.* Jamaica Pond Aqueduct Corp., 133 Mass. 361, 365, 366."

The description of the tract conveyed by St. 1788, c. 23, reads as follows (R., p. 600):

"All the Right title Claim and demand which this Commonwealth has in and to the following Tract of Land to wit: Beginning on the North Boundary Line of the State of Pensylvania in the parrallel of forty two degrees north latitude at a point distant eighty two miles west from the north east corner of Pen-sylvania on Deleware River as the said Boundary Line has been run and marked by the Commissioners of the States of New York and Pen-sylvania respectively and from the said point or place of Beginning running west upon the said Line to a meridian which will pass through that corner or point of Land made by the confluence of Thanahasgwaicon creek with the watersof the Genisee River, thence north along the said meridian to the Corner or point Last mentioned, thence northwardly along the Waters of the said Genisee River to a point two miles north of Thanawageras Village so called; thence running in a direction due west twelve miles; thence running in a direction northwardly so as to be twelve miles distant from the most westward bounds of the said Genisee River to the Shore of the Ontario Lake; thence eastwardly along the Shores of the said Lake to a meridian which will pass through the first point or place of beginning aforementioned; thence south along the said Meridian to the first point or place of beginning aforesaid, being such part of the whole Tract purchased by the Grantees as aforesaid as they have obtained a Release of from the Natives, together with all the appurtenances to the aforedescribed tract belonging. To have and to hold the same to them the said Nathaniel Gorham & Oliver Phelps, their heirs & Assigns forever, as Tenants in common & not as Joint Tenants."

While the Legislature accepted and adopted the description of the metes and bounds furnished and requested by Gorham and Phelps, the changes in the instrument show that that description was carefully

considered and clearly understood by the Legislature according to its tenor:

1. The Indian deed was a warranty deed; the statute is a quitclaim.

2. The Indian deed conveyed to Gorham and Phelps jointly; the statute conveys to them as tenants in common.

3. The word "bends" in the final course of the western line (which calls for the "shore of the Ontario Lake" as the terminal monument thereof) is changed to "bounds" in order more clearly to draw the line parallel to the Genesee River.

4. The enumeration at the close of the description in the Indian deed, viz.: —

"together with all and singular the woods, houses, streams, rivers, ponds, lakes upon or in any wise *appertaining* to said territory"

which is balanced and controlled by the word "appurtenances" in the *habendum* of that instrument, is stricken out in the statute and replaced by the clause,

"being such part of whole tract purchased by the Grantees *as aforesaid*, as they have obtained a release of from the Natives, together with all the appurtenances to the *aforedescribed* tract belonging."

It is settled law that land cannot pass as appurtenant to land.

Jones *v.* Johnston, 18 How. 150, 155.
Harris *v.* Eliot, 10 Pet. 54.
Childs *v.* Starr, 4 Hill 369, 382.
Ogden *v.* Jennings, 62 N. Y. 526, 531.
Armstrong *v.* Dubois, 90 N. Y. 95, 102.

Hence, where a tract bounds upon and so excludes the shore, the word "appurtenances" passes no part of the shore nor any land beneath the water.

Geneva *v.* Henson, 195 N. Y. 447, 464.
Commonwealth *v.* Alger, 7 Cush. 53, 80.
Whitmore *v.* Brown, 110 Me. 410.
Dunlap *v.* Stetson, 4 Mason 349, 366.

Thus, by striking out the enumeration and substituting therefor the word "appurtenances", the Legislature eliminated from the description the only language which by any stretch of construction could have included anything outside the boundaries described. This is a clear indication of the intention that the description furnished by the grantees is not to include anything not expressly within the terms thereof when strictly construed according to the rules of law. The precise question, therefore, is whether a statutory grant by the Commonwealth to two of its citizens, which, at the request of the grantees, runs the western line along or in reference to the Genesee River "to the shore of the Ontario Lake" and runs the north line "thence eastwardly along the shores of said Lake" conveys to the low water mark or only to the line where shore and upland meet.

In Storer *v.* Freeman, 6 Mass. 435, the court had before it two deeds made in December, 1790, that is, substantially contemporary with the deeds at bar. The first deed conveyed 12½ acres of land within certain boundaries, two of which were "running from a certain stake there described, N. 28° W. *to the shore* of the neck, thence *by the shore* to other land of the said Caleb" (grantor) (p. 436). In the second deed

two of the boundaries were "from a heap of stones northwestwardly seven rods, to a heap of stones, *at the shore* of the neck at William Elwell's corner, so called, thence by the shore to" (land conveyed by the first deed).

As to the first deed, after substituting the word "flats" for the word "shore", the court said (p. 439):

> "The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends to the flats, but not *over* them: and the flats being a bound of the land conveyed, are not a part of it."

With respect to the second deed, the court held that prima facie the construction was the same as the first deed, but that parol evidence was competent (not to contradict or explain the language of the deed) but to identify and place the heap of stones at William Elwell's corner; the court observing that while it could not presume that the boundary line crossed the flats, the plaintiff might prove, if he could, that this monument was located at low water mark and so included the flats or a part of them. Thus, Storer *v.* Freeman, which for almost a century has been a leading case, is square and weighty authority that "to the shore and thence by the shore", *uncontrolled by other language in the deed*, bounds upon the shore not upon the water's edge.

In Saltonstall *v.* Proprietors of Long Wharf, 7 Cush. 195, the court, in holding that in a deed made in 1771 a boundary "easterly on the sea or flats" passed the flats, since the sea was the major call, said, at p. 200:

"If, on the contrary, the deed had said only 'easterly on the flats,' that form of expression would have limited the grant to the upper part of the flats, and would have excluded the flats, between high and low water mark, from the grant."

So, also, in the famous note to Commonwealth *v.* Roxbury (1857), 9 Gray, 451, 524, compiled by Horace (later Mr. Justice) Gray, Mr. Gray, after citing authorities which hold that a boundary by the "sea", "creek," "river", or "bay" passes the flats, says:

"On the other hand, 'by the shore,' Storer *v.* Freeman, 6 Mass. 439; or 'beach,' Niles *v.* Patch, 13 Gray, 257; or 'flats,' Parsons, C.J., in Storer *v.* Freeman, 6 Mass. 439; Fletcher, J., in Saltonstall *v.* Long Wharf, 7 Cush. 200; excludes the flats."

In Niles *v.* Patch, 13 Gray, 254, 257, the court, in construing a deed of land "bounded westerly by the beach," said, by Shaw, C.J.:

"The body of the tract thus described is easterly of the Long Beach, and the question is, whether, by making the beach a westerly boundary, *without any other expression in the context or in any other part of the deed*, such a description includes the beach. 'Beach,' in its ordinary signification, when applied to a place on tide waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows. It is a term not more significant of a sea margin, than 'shore;' and bounding 'on the shore' does not include the shore. Storer *v.* Freeman, 6 Mass. 435. Had the term been 'sea,' or 'salt water,' or 'bay or harbor,' it might have brought the grant within the operation of the colony ordinance,* and carried the beach or flats, if the grantor owned it. We would not say that there might not be such terms *in the deed*, as, connected with the term 'beach,' would

* (Of 1641.–47.)

indicate an intent to include the beach; and such intent, *if anywhere manifest in the deed*, would govern its construction and convey the beach. *But in this deed there is no such qualification*, and therefore the court are of opinion that the defendant did not acquire by it a title in fee in the beach." (Italics ours.)

In Chapman *v.* Edmands, 3 Allen, 512, the court, in holding that an indenture of partition, which bounded the premises in dispute on "a small creek betwixt said land and land of J. L.", included no part of the flats beyond the creek, said, by Bigelow, C.J.:

"The peculiar phraseology of the indenture, fixing the boundaries by a creek which is described as lying between the premises set off to the ancestor of the demandants and the owner of the estate on the opposite shore or bank, takes the case out of the rule that an owner of land bounded on the sea or on a creek or cove shall hold to low water mark, *and brings it within the exception that, where the boundary is by the shore or flats, the grant is limited to the upland, and the flats do not pass as appurtenant.*" (Italics ours.)

So in Boston *v.* Richardson, 13 Allen, 146, 155, the court said by Gray, J. (later Mr. Justice Gray):

"In short, any boundary by the tide water, by whatever name, whether 'sea,' 'harbor,' or 'bay,' includes the land below high water mark, as far as the grantor owns; but a boundary *by that land itself*, whether described as 'shore,' 'beach,' or 'flats,' excludes it. See cases collected in 9 Gray, 524." (Italics ours.)

In Tappan *v.* Burnham, 8 Allen, 65, 72, a deed made in 1787 by which the land granted was bounded "on

land or the beach called Black Cove" was held to exclude land below ordinary high water mark.

In Litchfield *v.* Scituate, 136 Mass. 39, 48, plaintiff claimed one of the two parcels of beach described in the first count under a deed made by one Hatherly to Tilden in 1666. As to this the court says:

"The boundaries are not such that we can say that the deed conveyed the shore. One of the boundaries is 'by the high beach,' which, *unless it is controlled by other provisions in the deed, would exclude the shore below high-water mark.*" (Italics ours.)

The plaintiff claimed another parcel of beach under an allotment to Charles Chauncey (p. 48) "which runs 'by the beach' and there is an allowance for points of beach within the lines." As to this the court says:

"Apparently the beaches were not thought worth reckoning in determining the measurement of land. It may be that the parties to the deed regarded the beaches as worthless, and that the grantors had no intention of reserving the beaches that were outside the boundary lines; but, as matter of law, we cannot say that this allotment conveyed the beaches outside the lines.

In the case of each parcel, some of the conveyances subsequent to these, and under which the demandant claims, are without either definite description or bound on the beach. We cannot say, as matter of law, that they conveyed the shore. *A boundary on the beach is ordinarily held to exclude the shore, unless it is controlled by other parts of the deed.*" (Italics ours.)

In Litchfield *v.* Ferguson, 141 Mass. 97, the plaintiff claimed under a deed from W. to L., made in 1795, as to which the court says:

"The deed from A. D. Waterman, in 1795, to Ward Litchfield, who was the grantor of the plaintiff, bounded the tract conveyed 'northeasterly on the beach,' *and the boundary upon the beach necessarily excluded the shore, unless such boundary was controlled by some other parts of the description, which did not appear.*" (Italics ours.)

In Castor *v.* Smith, 211 Mass. 473, 474, the court said:

"In its usual signification 'the beach,' in grants of lands bounded upon tidal waters, means the space between ordinary high and low water mark, or the space over which the tide usually ebbs and flows. Unless terms occur *in the deed* indicating a different intent, a conveyance of land describing the beach as its boundary does not include the beach, but extends to the line of mean high water mark." (Italics ours.)

Several of the Massachusetts cases cited above construe deeds earlier than, or substantially contemporary with, the statute in the case at bar. The dates of these deeds and the cases in which they were considered are as follows: 1666 (Litchfield *v.* Scituate, 136 Mass. 39, 48); 1771 (Saltonstall *v.* Long Wharf, 7 Cush. 195); 1787 (Tappan *v.* Burnham, 8 Allen, 65); 1790 (Storer *v.* Freeman, 6 Mass. 435); 1795 (Litchfield *v.* Ferguson, 141 Mass. 97). They show that at the time when St. 1788, c. 23, was enacted the words "to the shore and along the shore" had already acquired a settled meaning which excluded the shore or beach. As the Legislature employed these words at the request of Gorham and Phelps in St. 1788, c. 23, in order to describe the premises granted to them by the Commonwealth, they must receive the meaning which they then had and still have. They cannot be so extended by implication as

to include any part of the beach or shore, or to bound the tract conveyed upon low water mark.

The rule is not peculiar to Massachusetts. It is generally in force in other states, including New York.

Newkirk *v.* Sherwood, 89 Conn. 508, 605.
Mellor *v.* Walmsley, 1905, 2 Ch. 164.
Axline *v.* Shaw, 35 Fla. 305.
Montgomery *v.* Reed, 69 Me. 510, 514.
(semble) Proctor *v.* Railroad Co., 96 Me. 458, 472.
Whitmore *v.* Brown, 100 Me. 410, 414, 416.
McClellan *v.* McFadden, 114 Me. 242, 247.
Sinford *v.* Watts, 123 Me. 230, 232.
Dunlap *v.* Stetson, 4 Mason, 349, 366.
Trustees of Easthampton *v.* Kirk, 68 N. Y. 459, 463.
Trustees of Easthampton *v.* Kirk, 84 N. Y. 215.
People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597.
(semble) McRoberts *v.* Bergman, 132 N. Y. 73, 83.
(semble) Oakes *v.* DeLancey, 133 N. Y. 227.
Geneva *v.* Henson, 195 N. Y. 447, 462.
Benson *v.* Townsend, 7 N. Y. Supp. 162.
Town of Oyster Bay *v.* Stehli, 169 App. Div. 257.
Landon *v.* Clark, 242 Fed. 30 (C. C. A. 2d).

In Trustees of Easthampton *v.* Kirk, 68 N. Y. 459, the town, which owned both upland and shore, conveyed by a deed which bounded the premises "by the clift or beach." The question was whether the boundary was high water mark or the cliff. In construing the deed, the court said (p. 463):

"In Storer *v.* Freeman (6 Mass. 435), Chief Justice Parsons, in interpreting a deed substituted the word 'flats' for 'shore'

in the description to give effect to the intent of the parties, and held that the land conveyed extended to the 'flats' but did not include any part of them. The reasons given by the chief justice in the case quoted for restricting 'shore' or 'seashore' to the ground between ordinary high water mark and low water mark are equally applicable to a boundary upon, by or along a beach. He says: ' It cannot be considered as including any ground always covered by the sea; for then it would have no boundary upon the sea side. Neither can it include any part of the land for the same reason.' "

At a retrial of the case (84 N. Y. 215), it was proved that at the time of the deed there was a strip of beach several rods wide between high water mark and the cliff. The court affirmed an instruction that the cliff as it was at the time of the deed was the western boundary, and therefore held that the intervening strip between the cliff and high water mark did not pass.

In People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, the deed to the Bartholomay Brewing Co. (one of the defendants here) described two of the bounds as "thence northerly along said street two hundred and ten feet to the beach of Lake Ontario; thence westerly at right angles one hundred feet to lands of J. D. Husband . . . " In holding that this deed conveyed no part of the beach, the court said, by Ruger, C.J. (p. 605):

"Here the words themselves are ambiguous as they purport to convey the line at one point 'to the beach,' and, according to general understanding, *such words would not include any part of the lands referred to as the terminal point.* Their literal signification is satisfied by a line which touches the beach at a single point; but even this might be overcome if *other*

language in the deed showed an intention to give the grantees title in the beach or a water front on the lake. The contrary of such an intention, is, we think, clearly and unequivocally expressed in the deed." (Italics ours.)

In McRoberts *v.* Bergman, 132 N. Y. 73, 83, the court, in holding that a deed which conveyed a certain salt meadow, bounded "southeasterly by sand beach or shore . . . And also all the right, title and interest of . . . (grantor) . . . of, in and to said beach, shore and waters of the bay . . . " included the shore, said (p. 83):

"The word beach denotes land washed by the sea, and in the absence of qualifying words, a boundary by the ocean, beach extends to high water mark." (Trustees of Easthampton *v.* Kirk, 68 N. Y. 459; People *ex rel.* Burnham *v.* Jones, 112 id. 605).

In Oakes *v.* DeLancey, 133 N. Y. 227, the court, in holding that a deed which gave a fixed course and distance "*to a point on the shore* of Long Island Sound; thence running along said shore *and sound* as the same bend and turn easterly and southerly to their intersection with" a certain street, and thence by other courses and distances to the place of beginning, included the shore because (1) the line ran along the shore *and sound* and (2) that construction precisely satisfied the distances and quantity of land called for by the deed, said (p. 230):

"But the appellant, relying upon the rule that fixed monuments control, and distances and quantities must yield to their superior authority, insists that the shore is such a monument, and by the shore is always meant the line of high water

when the boundary is the sea. *That is undoubtedly true and would be decisive if the first course ran simply to the shore.*" (Italics ours.)

In Geneva *v.* Henson, 195 N. Y. 447, the respondent claimed title to a portion of the shore and bed of Seneca Lake (a navigable lake 34 miles long), which was in the earlier grantors of Godfrey and Fellows, but which he claimed through Godfrey and Fellows under a deed to them which read in part: "Thence easterly on the said line (already described) *to a dock on the shore of Seneca Lake,* at which point an iron pin three quarters of an inch in diameter is driven into the timber of said dock; thence southerly *along the shore of said lake* to the north line of said lot lately owned by John D. Dix . . . "

The court in reversing a ruling that this vested title to the shore in plaintiff, said (p. 462):

"Taking up first the specific description of lands conveyed by the boundaries as contained in the Godfrey and Fellows and subsequent conveyances, the law is clear that even in the case of a small non-navigable river or body of water boundary lines running *to a fixed point on the shore thereof and thence along said shore do not carry title to the middle of the stream or body of water but only to the shore,* and this rule might apply even more strongly to such a body of water as Seneca Lake."

The court also held (p. 464) that since land cannot pass as appurtenant to land, this grant of the uplands "by definite shore boundaries" did not, by a further grant of the dock and appurtenances, pass any part of the shore or bed of the lake except that covered by the dock, and then continued:

"It is true that the referee found in the case of each conveyance, including those whose boundaries we have just considered, 'that each of said grantors . . . intended to convey and did convey the uplands described and also all the land under the water of Seneca Lake adjoining as is included between the north and south lines of the parcel described projected out eastwardly to the new preemption line.'* If the terms of description in the conveyances referred to were ambiguous or inconsistent, this finding might remedy the apparent defect in respondent's title. But it is well settled that, when the actual terms of a deed or other instrument are perfectly plain and unambiguous, their meaning cannot be changed or overturned by the unexpressed intention of the parties. Muldoon *v.* Deline, 135 N. Y. 150; N. Y. Life Ins. & Trust Co. *v.* Hoyt, 161 N. Y. 1, 9."

Geneva *v.* Henson may be shortly summarized as follows. The earlier grantors in respondent's chain of title owned the adjoining shore and bed of Seneca Lake to the preemption line. His immediate grantors conveyed by a deed which ran "to a dock on the shore of Seneca Lake . . . thence southerly along the shore of said lake." The deed expressly included the dock and appurtenances. The court holds (1) that the tract goes only to the shore, (2) that the additional grant of the dock and appurtenances passes only that portion of the shore and bed covered by the dock, and (3) that the language is so clear and unambiguous that even a finding by the referee that the several grantors intended to convey the adjoining bed of the lake cannot avail to enlarge the deed, since its meaning "cannot be changed or overturned by the unexpressed intention of the

* *Note.*—Seneca Lake runs approximately north and south and is intersected lengthwise by the eastern preemption line defined by the Hartford Treaty.

parties." It would be hard to present a stronger authority for the proposition that a deed which runs "to the shore and thence along the shore" unqualified by other words *in the instrument itself*, is plain and unambiguous, and as matter of law conveys no part of the shore.

In Benson *v.* Townsend, 7 N. Y. Supp. 162, a deed which conveyed a plot "beginning at the north corner of a smoke house now standing by the beach, running along the beach N. 55° west 2 chains 7 links to" a lot line, etc., was held to bound upon but not to include any part of the beach.

In Oyster Bay *v.* Stehli, 169 App. Div. 257, the court, in construing an Indian deed made in 1667 and confirmed in 1696, which could, however, convey no title (p. 259), but which ran to, along and from a certain beach, and was invoked as conferring some inchoate right as far as the water's edge, says very significantly (p. 263):

"Moreover, if the Indians intended to convey to the water what more natural than to name the sound as the manifest northern boundary? Why ignore the greatest monument which nature had placed before them if it was meant to be the limit?"

In Landon *v.* Clark, 242 Fed. 30, 36 (C. C. A. 2d), the plaintiff claimed to the center of a certain pond under a deed to a farm which described the premises as bounding "thence along the east shore of said pond." In affirming a decree dismissing the bill the Circuit Court of Appeals said, by Rogers, J. (p. 37):

"In the case now before the court the deed fixes the boundary as the 'east shore.' And the rule in New York is

that where, in a deed, land is described as bounded on the bank or shore of the stream, the grantee does not take title to the center, *but the bank or shore is the monument and not the stream* (citing cases). In this respect the law of New York does not differ from what we understood to be the law elsewhere."

The rule is tersely summed up in Gould on Waters, § 199 (see also 3 Farnham on Waters, p. 856), as follows:

"If the conveyance does not bound the land by the water, but refers to the shore or the land under the water as the boundary, it does not pass such shore or land."

It may be that the defendants will contend that fresh non-tidal waters possess no high water mark and therefore have no shore. Such is not the law. In Iowa and Arkansas a call for a navigable river fixes the boundary at high water mark.

Barney *v.* Keokuk, 94 U. S. 324 (Ia.).
Park Commissioners *v.* Taylor, 133 Ia. 453.
Bennett *v.* National Starch Co., 103 Ia. 207.
Wallace *v.* Driver, 61 Ark. 429.
St. Louis, etc., Ry. Co. *v.* Ramsey, 53 Ark. 314.
Winford *v.* Griffin, 1 Fed. 2d, 224 (C. C. A. 8, Ark.).

So a boundary "running up the said River Chattahoochee and along the western bank thereof" fixes the line at the ordinary high water mark.

Howard *v.* Ingersoll, 13 How. 381.
Alabama *v.* Georgia, 23 How. 505.
Oklahoma *v.* Texas, 260 U. S. 606, 631, 632.

In New York and Illinois it was intimated that a call for one of the Great Lakes as a boundary conveyed to high water mark.

People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, 606.
Matter of the City of Buffalo, 206 N. Y. 319, 324.
People *v.* Kirk, 162 Ill. 138, 146.
Cobb *v.* Commissioners, 202 Ill. 427, 431.
Illinois Central R.R. *v.* Chicago, 176 U. S. 648, 666.

These intimations did not finally crystallize into law; in both states a call for a navigable lake bounds the tract conveyed upon low water mark.

Stewart *v.* Turney, 237 N. Y. 117.
Brundage *v.* Knox, 277 Ill. 470.

But the final selection of the low water mark as the line of contact with the water necessarily recognizes that a high water mark exists in fact. Thus, a grant bounded upon the high water mark of a pond conveys to a fixed and unchanging line which is not in contact with the water.

Cook *v.* McClure, 58 N. Y. 437.
Nixon *v.* Walter, 41 N. J. Eq. 103, 106.

The authorities dispose of any contention that fresh non-tidal waters do not in fact possess both a high water mark and a low water mark separated from each other by a greater or less extent of shore or beach.

The proof in the case at bar establishes the existence of a high water mark and a low water mark. The

official records of the United States Government covering a period of over sixty years (1860-1922 inclusive) show an annual fluctuation in the level of the lake of from two to four feet (Plff.'s Ex. 55, atlas). The extreme variation is 5½ feet, between 243½ feet and 249 feet above mean sea level at New York. (Preston, R., p. 157; Gray, R., pp. 187–188; Abbot, R., p. 321.) Indeed, Gen. Frederic V. Abbot, a graduate of West Point and an officer in the United States Corps of Engineers from 1879 to 1920 (R., p. 311), who spent the greater part of that period upon problems of similar character (R., pp. 311–313) after observation of the premises and examination of the available data, fixes the ordinary high water mark of the lake at 248 to 248¼. (R., pp. 321–329.) Thus, the proof establishes the existence of a high water mark, of a low water mark and of a beach between them which is covered and uncovered by the rise and fall of the lake. Both in law and in fact the description is apt and accurate as applied to the situation disclosed by the evidence.

The case turns upon the meaning of a Massachusetts statute. The rule of construction is tersely stated by Rugg, C.J., in Bergeron, Petitioner, 220 Mass. 472, 475:

> "There are no means of ascertaining the purpose and effect of a statute except from the words used when given their common and approved meaning. They are to be read in the light of attendant conditions and the state of the law existent at the time of their enactment. But they cannot be stretched beyond their reasonable import to accomplish a result not expressed."

So also in Ebert *v.* Poston, 266 U. S. 548, 554, Brandeis, J., said:

"The judicial function to be exercised in construing a statute is limited to ascertaining the intention of the legislature therein expressed. A *casus omissus* does not justify judicial legislation."

In the case at bar the statute is a grant by a state to two of its citizens by a description furnished and approved by them. For both reasons it must be construed against them and in favor of the Commonwealth. The Massachusetts decisions already cited establish that the common and approved meaning of a boundary running "to the shore of the Ontario Lake, thence eastwardly along the shores of said Lake" when read in the light of attendant conditions and the state of the law existent at the time of its enactment, restricts the grant to the upland, and includes no part of the shore or beach. It does not convey to low water mark or define a line in contact with the water.

Axline *v.* Shaw, 35 Fla. 305.
People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597.
Geneva *v.* Henson, 195 N. Y. 447.
New York Central, etc., R.R. *v.* Moore, 137 App. Div. 461; 203 N. Y. 615.
Cook *v.* McClure, 58 N. Y. 437.
Sloan *v.* Biemiller, 34 Oh. St. 492.
See also Sweringen *v.* St. Louis, 151 Mo. 348.

The Burnham case and Geneva *v.* Henson have already been considered.

In New York Central, etc., R.R. *v.* Moore, 137 App. Div. 461, affirmed 203 N. Y. 615, one Hornby, in 1815, became the owner of a certain tract "bounded on the east by Irondequoit Bay, north by Lake On-

tario." In 1819 he conveyed to Sylvester Woodman a parcel containing 100 acres by a deed which defined the *east* line of that parcel as "the shore of Irondequoit Bay." In 1825 he conveyed the so-called "sand bar" to Bronson by a deed which described it as "bounded on the *west* by the *east* line of a tract of 100 acres sold to Sylvester Woodman." In construing these conveyances the court said (p. 463):

> "The east line of the Woodman premises is the west line of the Bronson land. The conveyance to Woodman makes the east line of the premises thereby conveyed the shore of the bay, and the north line, the lake shore. . . . The intention of the parties that the shore of the bay should be the east line is certain."

It is too plain for argument that if the deed from Hornby to Woodman, which bounded the Woodman parcel on the east by "the shore of Irondequoit Bay," had conveyed to the water's edge there would have been nothing left to convey to Bronson, for Hornby himself only owned to the edge of the water. The construction placed on the Woodman deed by the court leaves no question that a boundary upon the shore of Lake Ontario *excludes* the shore. The construction placed by the court below upon this deed was approved by the Court of Appeals, 203 N. Y. 615, 618.

In Cook *v.* McClure, 58 N. Y. 437, A. conveyed to the plaintiff a certain tract which expressly included the land covered by a certain pond, bounding it "along the high water mark of said pond." He later conveyed his remaining land (which of course bounded on the high water mark of the pond) to the defendant. The high water mark of the pond gradually receded as a result of accretion; the defendant occupied the additional

land, and plaintiff brought this action of ejectment. The trial court left it to the jury to say whether the locus in dispute was below the then high water mark of the pond, and there was a verdict for defendant. In reversing this judgment and holding that a boundary upon the high water mark of the pond was not in contact with the water and gave no right to accretions the court said (p. 441):

"It may be remarked that the reason given in the cases where the boundary is upon the banks of the stream that it should go to low water mark, and in some cases for giving the alluvium insensibly formed to the riparian owner — that the party should not be cut off from but continue to have access to the water for use — has no application to this case. The line was fixed at the high water mark of the pond. Hence the grantor reserved to himself nothing whatsoever in the water or the land covered by it. He could not without trespassing reach the water at all only when at high water mark, and then had no right to it or in it for any purpose. The land between high and low water mark clearly passed to the grantee under the deed."

In Nixon *v.* Walker, 41 N. J. Eq. 103, Chancellor Runyon, in citing Cook *v.* McClure said (p. 106):

"In Cook *v.* McClure, 58 N. Y. 437, where a boundary was along the high water mark of a pond, it was held that the line thus given was a fixed and permanent one, the line of high water at the date of the deed, and did not follow the changes of the high water mark of the pond."

In Sloan *v.* Biemiller, 34 Ohio St. 492, the plaintiff who owned Cedar Point, which lies between Lake Erie and Sandusky Bay, conveyed to the defendant by a

deed which described the premises in part as follows (p. 494):

"Commencing at a stake *on the bay shore;* thence (by divers courses) *to the lake shore;* (thence to a certain stake); thence *following the bay shore* to the place of beginning."

The deed reserved an exclusive right to fish in both lake and bay. The defendant grantee fished in violation of this reservation, and the plaintiff brought a bill in equity to enjoin him. In defining the plaintiff's claim the court said (p. 511):

"The plaintiff's claim is in substance that as owner of the land *on the lake and bay shore* he has a right to control these fisheries to the middle of the lake."

After holding that plaintiff's title extended only to the water's edge the court continued (p. 513):

"The question here is whether the right of fishing in the lake and bay is limited to the plaintiff *as proprietor of the shores.*"

The court then held that the owner of the shore had no such right and dismissed the bill.

The most carefully considered case in regard to a boundary running "to the shore and along the shore" of a navigable lake is Axline *v.* Shaw, 35 Fla. 305. In Axline *v.* Shaw the plaintiff filed her bill to enjoin interference with the riparian rights alleged to belong to a certain lot of which the material boundaries were "thence west (course and distance) *to the shore of* Orange Lake, *thence northwesterly with said shore of said Lake* to the north line of said section 1" (and thence with said north line to the place of beginning). Orange Lake was deemed a navigable lake (308) and

the *low water* mark was held to be the line of riparian ownership. (310.) It appeared that plaintiff's grantor owned the adjacent lands submerged by the waters of the lake (308), but the court held that the question whether these lands passed or did not pass must be determined by "the terms of the deed of conveyance" (p. 309). In dismissing the bill, the court said (p. 310):

"In order for one to have riparian rights there must be an actual water boundary of the land in connection with which such rights are claimed. Sullivan *vs.* Moreno, *supra*. Examining Mrs. Axline's deed, does it show a water boundary? One of the boundaries of her land is the shore of Orange Lake. In conveyancing, the word 'shore' as applied to the sea and to tidal waters, has a definite and generally understood signification. It means that portion of land at the water's edge which is daily covered, and daily left bare by the rising and falling of the tides. Gould on the Law of Waters, secs. 3, 28; Black's Law Dictionary, *title* Shore; Storer *v.* Freeman, 6 Mass. 435, text 439, S. C. 4 Am. Dec. 155. As applied to inland waters, so exact a definition can not be given. The word generally has only application to large bodies of water, as lakes and large rivers, and means the land adjacent thereto. Webster's International Dictionary. If a boundary upon "the shore" of the lake is an equivalent term to a boundary upon the lake itself, or the waters of the lake, then Mrs. Axline is a riparian proprietor; otherwise she is not. We do not think the expressions are equivalent. Her land is bounded by 'the shore.' The shore is land. The word 'shore' is an antithetic term to that of 'water.' Their significations, instead of being synonymous, are the opposites of each other. Therefore the boundary is land, and not water. Her land being bounded by the shore of the lake, the idea is excluded that it is bounded by the lake itself, or the waters thereof. The deed of Mrs. Axline does not even convey the shore. It conveys 'to the

shore.' A deed conveys all within the boundaries, but does not convey the boundary itself. Gould on the Law of Waters, sec. 199.

An early American case upon this subject is Storer *vs.* Freeman, *supra*, in which it is said: 'The present question is, therefore, a question upon the construction of the deeds of conveyance. The lands are not expressly bounded on the sea or salt water; but they extend to the sea-shore, and are bounded by it; which, as the plaintiff has argued, are expressions of the same import.' The court then proceeded to define *shore* and *sea-shore*, and then continued: 'The shore mentioned in the deed is not covered with rock, but forms a beach or flats, we shall for *shore* substitute *flats*. The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends *to* the flats, but not *over* them; and the flats being a bound of the land conveyed, are not a part of it.' The deed under consideration makes the shore of the lake a monument, and it should be treated as such. A grantor in a deed may make the shore of a lake or stream a monument of boundary, just as well as a road, wall or ditch, or other similar object. Bradford *vs.* Cressey, 45 Maine, 9; Trustees of East Hampton *vs.* Kirk, 68 N. Y. 459; City of Boston *vs.* Richardson, 13 Allen, 146, text 154, and authorities cited. There is a manifest difference between land bounded by the lake itself, and bounded by the shore of the lake. Bounded by the navigable water, the lake or the stream, the law extends the boundary to the edge of the channel. If bounded by the shore or bank, the land does not reach the water, but is limited to the upland. Clement *vs.* Burns, 43 N. H. 609, text 616; Nickerson *vs.* Crawford, 16 Maine, 245, and authorities cited on page 246; Chapman *vs.* Edmands, 3 Allen, 512; text 514; Niles *vs.* Patch, 13 Gray, 254. Where a boundary is limited 'to the bank of a stream,' it necessarily excludes the stream itself. Hatch *vs.* Dwight, 17 Mass. 288, text 298, 299, S. C.

9 Am. Dec. 145; Daniels *vs.* Cheshire R.R. Co., 20 N. H. 85. The description in the deed, by which the line extending to the shore is stated to extend 'thence northwesterly with said shore of said lake to the north boundary line, etc.,' does not show an actual water boundary.

A very similar case is Montgomery *vs.* Reed, 69 Maine, 510. We quote from the opinion of the court as follows: 'The second call therein commences at a certain point south of the inlet and runs thence north . . . to the shore of the Damariscotta river . . . The 'shore' is the ground between the ordinary high and low water-mark — the flats — and is a well-defined monument. 'To' is a word of exclusion when used in describing premises — 'to' an object named excluding the terminus mentioned. Bradley *vs.* Rice, 13 Maine, 198 (S. C. 29 Am. Dec. 501); Bonney *vs.* Morrill, 52 Maine, 252, 256. 'To the shore', then includes no part of the 'flats.' The third call is 'thence northerly and westerly, as the shore lies, round a point of land and round the head of a cove, to the northeast corner * * '. This obviously does not include any of the 'shore' or 'flats' in the cove, for the line called extends along the outside limits or margin of the shore, or of high water-mark. Thus a call ' to the margin of the cove, then westerly along the margin of the cove,' *etc.*, was held to bound by a line without the edge of the water, and that the flats were not included. Nickerson *vs.* Crawford, 16 Maine, 245. See also Dunlap *vs.* Stetson, 4 Mason (C. C.), 349; Litchfield *vs.* Ferguson, 141 Mass. 97. In a note to Commonwealth *vs.* City of Roxbury, 9 Gray, 451 (524), is quite a collection of cases upon this point, of which a few have been cited herein.

Our conclusion is, that conceding Orange Lake to be a navigable stream, Mrs. Axline is not a riparian proprietor. She does not own lands actually bounded by and extending to low water-mark."

In Sweringen *v.* St. Louis, 151 Mo. 348, the plaintiff claimed certain land as an accretion to a certain lot

which was conveyed to him by a United States patent, which bounded the lot by a line which ran from a designated point "down the bank of the Mississippi River, with the meanders thereof *between high and low water mark*" to another designated point. In Missouri the line of contact with the water is low water mark (State *v.* Longfellow, 169 Mo. 109, 127). In holding that as matter of law the plaintiff was not entitled to accretions the court said by Gantt, J. (p. 355):

"It is fundamental to the law of accretions that the lands to which they attach must be bounded by the river or stream to entitle its owner to such increase.

. . . . . .

In the very nature of things, then, accretions depend upon actual contiguity. Any separation of the claimant's land from the accumulated alluvion by the lands of another, however narrow the strip may be, or whatever the size of the claimant's tract behind it, precludes his right to alluvion.

Now, in the patent to Lebeaune, the river was not mentioned as a boundary. On the contrary, the eastern boundary is a permanent line fixed by courses and distances, metes and monuments, 'between high and low water mark.'"

Castle *v.* Elder, 57 Minn. 289, does not help the defendants. In that case lot 1, block 28, was platted as abutting on Lake St. Croix. In 1857 it was conveyed by Burkels to Mower by express reference to the recorded plat and with the further description "Sixty feet front on Lake St. Croix." In 1868 Mower conveyed to Rheiner by a description of which the material part is as follows (p. 293):

"All that part of lot No. 1 of block 28, *according to the recorded plat thereof*, bounded as follows, to wit: . . . on a line parallel with Chestnut St. to the shore of Lake St. Croix,

thence northerly along said lake shore to the north line of said lot . . . *being the same premises conveyed*" (*by the aforesaid deed from Burkels to Mower, which was duly identified by reference to the record.*)

Between 1848 and 1894, (the date of the action) the lake had been artificially filled in with rubbish from 100 to 200 feet. The court held that the conveyance "according to the recorded plat" and the further statement that the premises conveyed were "the same premises" conveyed by Burkels to Mower, by the deed expressly referred to, sufficiently stated the intention to bound upon the lake (293). In the case at bar there is no prior plat bounding upon the lake; on the contrary the Shepard survey made in 1803 bounds both lot 20 and lot 21 upon the beach. Nor is there any prior deed expressly bounding the premises upon the lake; on the contrary the Indian deed bounds the premises therein described upon the shore, and the legislature at the request of Gorham and Phelps used that description in the statute. The very things which in the *Elder* case qualified the description, here support and confirm it.

Hathaway *v.* Wilson, 123 Mass. 359, rests upon special facts not present in the case at bar. In that case the estate of one who died intestate was sent by the Probate Court to lay commissioners for partition. It was their duty to divide the whole estate. They set off as part of the widow's dower a parcel of land running "to George Brightman's shore, thence by said shore," but in the same deed gave to the other heirs a privilege to take seaweed from the shore in question. If the widow did not take to low water mark that parcel of shore remained unpartitioned. The court held that

these lay commissioners had used technical words loosely and inaccurately, and gave to them the effect which they had to receive in order to give effect to the seaweed privilege and to make the complete partition which the commissioners were bound to make. In the case at bar it is inadmissible to assert that when the legislature considered and adopted the description tendered by Gorham and Phelps, it used words of art loosely, inaccurately and without appreciation of their significance. Moreover the fact that Hathaway *v.* Wilson stands alone upon its own narrow ground is made very clear by Litchfield *v.* Scituate, 136 Mass. 39; Litchfield *v.* Ferguson, 141 Mass. 97, and Castor *v.* Smith, 211 Mass. 473, all of which were subsequently decided and hold that a boundary upon the shore or beach excludes the beach.

The defendants may invoke a class of cases which superficially resembles the case at bar but which differs radically from it. Sometimes a conveyance is made running by some appropriate description "*to the water and thence along the shore.*"

> Stewart *v.* Turney, 237 N. Y. 117, 131.
> Burke *v.* Niles, 13 New Brunswick, 166.
> Haskell *v.* Friend, 196 Mass. 198, 200–202.
> Doane *v.* Willcutt, 5 Gray, 328, 335.

In other words, the side line runs "to the water" (*i.e.*, "sea", "bay", "harbor", "lake", "river" or the like) and "thence along the shore." Here the terminal monument of the side line is the *water*, not, the *shore*, and therefore the boundary drawn from that point along the shore is drawn along the *water* side of the beach, where beach and water meet, whereas when the

shore (*i.e.*, land) is named as the terminal monument the line is drawn where beach and upland meet and is divided from the water by the whole width of the shore. The distinction is so fully explained in Doane *v.* Willcutt, *supra*, and Haskell *v.* Friend, *supra*, that no more need be said except to note that the latter case expressly recognizes and reaffirms the rule upon which the Commonwealth relies (196 Mass. 200):

"It is settled that a boundary 'on the shore' does not include the space between high and low water mark if the word 'shore' is used in its technical sense. Storer *v.* Freeman, 6 Mass. 435. The same is true in the case of a boundary upon the 'beach'. Niles *v.* Patch, 13 Gray 254; Litchfield *v.* Ferguson, 141 Mass. 97. Also in case of a boundary upon the 'flats'. Jackson *v.* Boston & Worcester Railroad, 1 Cush. 575."

In this connection we may point out that in People *v.* Kyser, 78 Misc. (N. Y.) 612, which is only a county court decision, the boundary of Madison County, which is incorrectly quoted by the court, is defined in 5 Birdseye's Consol. Laws, 1st Ed. 1909, p. 6596, as follows:

"then northerly down the (Oneida) Creeks *to the Oneida Lake,* and thence westerly along the southerly shore to the military tract . . . "

That case, for what it is worth, falls in the class just considered.

The Shepard survey marks the actual boundary upon the soil at the line where upland and beach meet, precisely in accordance with the natural meaning of the statute when construed in the light of the Massachusetts cases and applied according to the New York authori-

ties. That survey was made in 1803 and became the basis of the partition deed of October 16, 1804, through which all the individual defendants claim under Sir William Pulteney. The full notes are set out *verbatim* in the record at p. 555 and have already been considered in the statement of the case. In brief, Shepard first laid out a highway 1.50 chains wide running "*to the shore of Lake Ontario*" (Rec., p. 555). On each side he laid out a tier of lots 4 chains from north to south and 10 chains from east to west — the eastern tier bounding easterly upon the river. He ran the western boundary of this tier of lots (and easterly line of the highway) a fixed distance N. 28° E "*to the beach of the lake*" where he set a marked post *and gave a cross bearing to mark the location of that post and the terminus of that line* (Rec., p. 556 bottom.) The east and west lines of the western tier of lots he likewise ran a fixed distance N. 28° E "*to the beach of the lake*" where he also set marked posts *and gave cross bearings to mark the location of those posts and the termini of those lines.* (Rec., p. 556, top and middle.) For the north line of Lot 20 (the most northern lot of the western tier) he ran a "Traverse of the Lake Shore of Lot No. 34" (the next lot to the west) to the northwest corner post of lot 20, thence to the northeast corner post of that lot, and

"Thence S. 62° E 1.50 to the east line of Main Street *on the Lake Shore.*" (R., p. 557 top.)

the notes then show that —

"*on the Lake Shore of Lot No. 21* from Main Street east line" (Rec., p. 557)

he ran two designated courses to a stake which marked the N. E. corner of the township. He ran no boundary

to mark the eastern line of the eastern tier of lots, because they bound upon the river.

The Shepard survey is further confirmed by the survey of lot 21 made by David Finley in 1810. Finley, like Shepard, bounds that lot on the shore of Lake Ontario (Rec., p. 107, *et seq.*).

The defendants may suggest that early conveyances by Phelps and Gorham or by Phelps to Ewing (1790) Sturgin Sloan (1791) and Mary Crosby (1794), which are printed in the record without number (p. 729 to 734; see also Report, p. 41) indicate that the grantors claimed to the water's edge. Of course that claim, if substantiated could not affect the construction of the statute. But under the circumstances it is a doubtful claim at best. All three deeds conveyed an undivided sixteenth interest in Township 2, Short Range, which *township* is described as "bounding" north upon the Lake and east upon the Genesee River. But these are words of location not words of description, for no west and southern boundaries of the township are given. All three conveyances preceded the Shepard Survey. Crosby and Sloan were parties to the partition deed of 1804 (Deft.'s Ex. 1) and thereby assented to the Shepard Survey. None of them received lands in severalty bounding upon the Lake. Indeed it does not appear that any of them except Crosby even received lots bounding upon the shore. Under these circumstances the claim that these deeds conveyed or were intended to convey any land bounding upon the lake vanishes into thin air. They do not in any way qualify the Shepard Survey, which translated the statute into actual metes and bounds.

The Shepard notes contrast a northern line bounded

upon the *beach* by monuments whose position is identified by cross bearings, with the eastern line of the eastern tier of lots, which is not drawn at all because the river forms the boundary. That survey was made in 1803, within fifteen years of the grant to Phelps and Gorham, as the foundation of their partition deed of 1804, (Deft.'s Ex. 1) by which lots 20 and 21 were conveyed to Sir William Pulteney, through whom both the Bartholomay Company and the New York Central claim. That survey has been placed on record like a deed and is today the basis of conveyance and of title. It marks upon the soil the construction which both Gorham and Phelps and Pulteney placed upon the grant made by St. 1788, c. 23 — and that construction is precisely in accord with the natural meaning of that act construed in the light of the Massachusetts decisions and applied according to the New York cases.

The reasoning by which the Master finally reaches the conclusion that St. 1788, c. 23, bounds the tract conveyed upon the water is inadmissible (Report, 63–72). It rests primarily upon cases relating to *non-navigable* streams (Child *v.* Starr, 4 Hill. 369; Halsey *v.* McCormick, 13 N. Y. 296) and ignores not only the Massachusetts cases which hold that a call for the shore as a terminal monument is a call for *land*, not *water*, but also the cases in New York and other states which hold that a boundary upon the shore of a *navigable* lake is not in contact with the lake. It enlarges a grant made by a state to two of its citizens, although they furnished and approved the description employed, and later marked that description upon the soil with monuments which fix the boundary where beach and upland meet and not where

land and water meet. Under these circumstances the language accepted by the legislature from the grantees and embodied in the statute is not to be enlarged or modified by any supposed but unexplained intent of the framers of it.

Geneva *v.* Henson, 195 N. Y. 447, 464.
New York Life Ins. Co. *v.* Hoyt, 161 N. Y. 1, 8.
White's Bank *v.* New York, 64 N. Y. 65, 72.
Muldoon *v.* DeLine, 135 N. Y. 150, 153.
Rockwell *v.* Baldwin, 53 Ill. 19.
Whitmore *v.* Brown, 100 Me. 410, 413.

The error into which the Master has fallen becomes self-evident if we collate his conclusion as to the treaty and his conclusion as to the statute. He has laid both upon the bed of Procrustes. In the case of the Treaty a clear and unambiguous call for the international line as the northern boundary, is restrained by construction so as to convey no part of the bed of the lake. In the case of the statute a clear call for the shore as the northern boundary, which the grantees have actually marked upon the soil where beach and upland meet, is extended by construction across the beach to the water's edge. The Commonwealth respectfully submits that a call in a treaty for the international line in the middle of the lake as a northern boundary, and a call in a statute for the shore of the lake as a northern boundary cannot be so construed as to make both boundaries coincide upon the margin of the lake without doing violence to both instruments.

It may be that the defendants will contend that to give to the treaty and statute their plain and inescap-

able meaning will produce inconvenience. Inconvenience is of course no answer to the truth, and a court of equity must hold to the truth before all things. But we deny the inconvenience. A glance at the map will show that no place of any size, no harbor, and no river of any size except the Genesee exists between Great Sodus Bay, where the eastern boundary of the treaty tract enters the lake, and the western boundary of the tract conveyed to Gorham and Phelps. Rochester proper lies at the falls of the Genesee about seven miles inland. There never will be cities or ports or any great development along this part of the lake because the lake lies much below the level of the upland at the foot of the precipitous bluffs which are divided from the water by beaches. Imperceptible changes in beaches lying at the foot of high bluffs will never be of any great significance. The present case would probably never have arisen if the jetties built to improve the navigation of the Genesee had not caused an unusual broadening of the beach at that point, followed by a lawless appropriation of the enlarged beach by the Railroad and the Bartholomay Company in the face of the record title of the Commonwealth and without notice to it. No similar case is likely to arise again.

The real issue in this case is whether defendants, who appropriated the locus without right, or Massachusetts, who holds the record title thereto and is protected from encroachment by Article VII of the Treaty, shall receive the proceeds thereof in money. The bill (Sec. III, Part F, Rec., p. 16) shows that negotiations for the sale of this property to Rochester await the conclusion of this case. If Chattanooga *v.* Georgia, 264 U. S. 472, applies, the locus would be subject to condem-

nation. This possibility was recognized by the prayers of the bill (Rec., p. 17) although this suit was brought before the *Chattanooga* case was decided. In the past Massachusetts treated the defaulting Gorham and Phelps not only fairly but generously. She can be trusted to act fairly and generously in the future. In the face of the *Chattanooga* decision she could not wisely act otherwise even if she were disposed to do so, as she is not. Simple justice requires that her property (or its proceeds) should not be taken from her and given to two private corporations, which seized it in the fact of the record and without right, upon any assertion by them of inconvenience.

Point Three.

THE ADVISORY CONCLUSION AS TO THE PRACTICAL CONSTRUCTION OF GRANTS IS ERRONEOUS.

I. The Settlement with Gorham and Phelps.

The master (p. 72) suggests that Massachusetts agreed to sell to Gorham & Phelps "the entire right acquired under the Treaty of Hartford." (R., p. 72.) The precise words of the resolve of April 1, 1788 (Res. 1787, c. 135) are:

"And this Commonwealth doth hereby agree to grant sell & convey to the said Nathaniel Gorham and Oliver Phelps, Esquires, all the right title & demand, which the Commonwealth has in & to the said Western Territory by the deed of cession aforesaid to have and to hold the same to the said Nathaniel Gorham & Oliver Phelps, their heirs and assigns forever, upon the conditions hereafter expressed; and the said Nathaniel Gorham & Oliver Phelps are hereby authorized to extinguish by purchase the claim of the Native Indians, holding the fee or right of soil in the Territory aforesaid."

It may well be questioned whether this agreement when construed, as it must be, against the purchasers and in favor of the State, imported any obligation to sell to Gorham and Phelps any part of the bed of the lake. The point is not very material, however, since the Indian deed to Gorham and Phelps ran only "to the shore of the Ontario Lake, thence Eastwardly along the shores of said Lake;" Gorham and Phelps only asked the Commonwealth to grant by the same description; the Commonwealth did so at their request by St. 1788, c. 23; Gorham and Phelps subsequently traced their construction of that act upon the soil by the Shepard survey of 1803; and the line so traced by Shepard bounded lots 20 and 21 *not upon the lake but upon the beach*. As the south and east boundaries of the tract granted by St. 1788, c. 23, were drawn upon the treaty boundaries, and the west and north lines defined by that act were admittedly drawn in order to exclude all of the treaty tract which lay outside them, the subsequent default of Gorham and Phelps and the settlement with them have rendered immaterial the extent of the tract which the Commonwealth agreed to convey by Res. 1787, c. 135.

St. 1788, c. 23, was approved November 21, 1788. The bond for the first installment of the purchase price (£100,000 in consolidated securities) fell due on April 1, 1789 — that is, one year from the date of Res. 1787, c. 135. Phelps and Gorham defaulted upon that bond and the Commonwealth brought suit upon it. Upon February 15 and 26, 1790 (*i.e.*, shortly before the bond for the second installment became due), Gorham and Phelps submitted proposals for a modification of the contract made by Res. 1787, c. 135. On March 5,

1790, the legislature accepted the proposals of February 26 by Res. 1789, c. 153, which reads as follows (without title):

On the memorial of the honble. *Nathaniel Gorham* Esqr. and *Oliver Phelps* Esqr. and upon consideration as well of their Proposals made on the fifteenth day of *February* last, as of their proposals made on the twenty sixth day of *February* last, together with other Proposals in addition this day made, respecting the western Territory so called bargained to them on the first day of *April* A D 1788.

Resolved that this Common Wealth do accept of said Proposals dated on the 26th day of *February* last as taken togeather with the two last clauses of the additional proposals made this day, reserving to this Common Wealth according to the said additional proposals the right of accepting in preference at any time within one year from this date the said Proposals dated on the fifteenth day of *February* last. And the said Common Wealth doth accordingly agree with the said *Gorham* & *Phelps* as to the two third-parts of the said Western Territory and as to their two Bonds not in suit which were given therefor and as to all other the Provisos and Conditions in the said accepted Proposals recited. *Provided nevertheless* that if on division of the said lands east of said line of Cession it shall appear that the value of the said lands in which the said *Gorham & Phelps* have already extinguished the native right shall exceed the one third part of the value of the whole of the said territory then the said *Gorham & Phelps* shall pay to the said Commonwealth for the overplus in the consolidated notes of this Commonwealth at the same rate they pay for said third part, or the value of such notes in specie estimating them at their present market price. *Provided also* that so far only as the said *Gorham & Phelps* shall at their own costs & expence extinguish the native right in said two thirds of said land and lay the same out into townships within five years from the date of this resolve they shall be intitled

to one undivided fourth part of the lands in which they shall so extinguish the native right and so lay out said lands on the terms aforesaid. And the Grants Releases Bargains Covenants and Agreements and all other matters and things in the said Proposals and also the said reservation to this Common Wealth as aforesaid offered and agreed to be made and hereby accepted shall be more fully set forth and carried into effect by legal and sufficient Writings and Indentures to be executed and delivered as well on the part of the said Common Wealth as on the part of the said *Gorham & Phelps*, and that the Honoble. *James Sullivan* Attorney Genl. & *SamL. Sewall* Esqr. & the Honble. *Nathan Dane* Esq. shall be and hereby are appointed and authorised in the name and Behalf of this Common Wealth to agree upon and establish all legal and sufficient Writings and Indentures which shall be found necessary more fully to set forth and carry into effect all and singular the premises according to the true intent and meaning of the said proposals hereby accepted and of this Resolve — and to sign seal execute and deliver all and singular the writings and Indentures which shall be necessary on the part of this Common Wealth, receiving at the same time from the said *Gorham & Phelps* all and singular the writings and Indentures on their part to be made and which shall be deposited in the Secretary's office.

Resolved, that the expences of dividing the said tract of land by Commissioners as aforesaid shall be paid one moiety thereof by the Commonwealth, & the other moiety by the said *Gorham & Phelps*. March 5, 1790.

On June 9th, 1790, Gorham and Phelps and the Committee named in the resolve executed and exchanged indentures (Defts.' Ex. 31, R., p. 635), which recited the resolve and the two proposals, and of which the material provisions are as follows (R., pp. 637, 639):

Now this Indenture Witnesseth, that the said Gorham and Phelps, for and in consideration of the annulling and release

by the said Commonwealth of two certain bonds hereinafter mentioned, and also in consideration of the other covenants and agreements in this indenture expressed, and on the part of the said Commonwealth to be performed, have granted released and confirmed; and do by these presents grant, release, and for themselves & their heirs, quitclaim and confirm, unto the said Commonwealth, their Grantees, and the heirs and assigns of such grantees, all that right of pre-emption of the soil from the native Indians, and all other the estate, right title and property which the said Commonwealth had by virtue of the Deed of cession and agreement executed in behalf of the said Commonwealth and of the State of New York, by their respective Commissioners at Hartford on the sixteenth day of December Anno Domini seventeen hundred and eighty six, or otherwise, and which the said Gorham and Phelps now have, or might have by virtue of the said Resolve of the first day of April, Anno Domini seventeen hundred and eighty eight, or by virtue of any other Resolve or Act of the said Commonwealth, or by virtue of any purchase from the said Native Indians, or from any other person or persons State or Corporation, and all other the claims and demands of the said Gorham and Phelps of in or to, two undivided third parts of the said territories and lands in the said Deed of cession described, and by the said State of New York ceded and confirmed to the said Commonwealth, reference thereto being had, and lying eastward of the said line of cession from the said Commonwealth to the United States, saving and reserving only to the said Gorham and Phelps their heirs and assigns, that in the division of the said territories and lands, the third part thereof retained, and which shall be assigned in severalty to the said Gorham and Phelps their heirs or assigns, shall be set off within that part of the said territories and lands which is already by them purchased of the said native Indians, and shall as far as possible comprehend their sales already actually made;

. . . . . .

And the (said) Gorham and Phelps for themselves their heirs and assigns hereby bargain and agree to and with the said Commonwealth, and the said Commonwealth hereby bargain and agree, to and with the said Gorham and Phelps, their heirs and assigns, that in case that part of the said lands and territories in which the said Gorham and Phelps have already extinguished the native right, and which is confirmed to them by an act or grant of the said Commonwealth passed on the twenty first day of November Anno Domini seventeen hundred and eighty eight, doth exceed an equal third part, according to the estimation aforesaid, of the whole of the said lands and territories lying eastward of the said line of cession to the United States, then the said Gorham and Phelps, their heirs or assigns shall and will purchase, and the said Commonwealth, or their assigns shall and will sell and convey to the said Gorham and Phelps, their heirs or assigns all such overplus or residue of land, more than such one third as aforesaid lying and being within the bounds in the said Act or grant last mentioned described, to hold as therein mentioned, the said Gorham and Phelps their heirs or assigns paying therefor to the said Commonwealth or their assigns at the same rate and porportionably as the said Gorham and Phelps have agreed to pay for the one third part of the said territory retained by them as aforesaid, either in the consolidated notes of the said Commonwealth, or in gold or silver equivalent, estimating such notes at the present market price, such estimation to be considered however as respecting this bargain only."

The contingent provisions of the indenture relating to the possible acquisition by Gorham and Phelps of an undivided quarter interest in the undivided two thirds of the lands released have become immaterial in view of the right reserved to the Commonwealth to cancel said privilege, which right was exercised by Res. 1790, c. 45, approved February 18, 1791. (Report, p. 30.)

By Res. 1790, c. 44, approved February 16, 1791 (Plff.'s Ex. 66, R., p. 610) the legislature appointed Samuel Phillips, Walter Spooner, David Cobb, Thomas Davis, and William Eustis a committee with full power to make a final and absolute settlement with Gorham and Phelps of the bond in suit. Accordingly on March 10, 1791, this Committee and Gorham and Phelps executed a further indenture (Plff.'s Ex. 73, R., p. 620) by which it was agreed that Gorham and Phelps should pay the £100,000 at the rate of six shillings in *specie* for each twenty shillings of notes, which sum, after deducting certain payments made, was found to be £29,146 1s 6d. (R., p. 621.) As Gorham and Phelps were unable to pay this sum in cash, they paid down £6,000 (R., p. 621) and turned over to the Commonwealth divers bills, bonds and mortgages (more fully described in the indenture) upon which the Commonwealth was left to realize as best it might.

The net result of these settlements may be summarized as follows:

1. All rights of Gorham and Phelps under Res. 1787, c. 135, were terminated.

2. Phelps and Gorham were to have set off to them *within the bounds of the tract granted to them by the Act of November 21, 1788* (St. 1788, c. 23) one third *in value* of the treaty lands; if the tract so granted by St. 1788, c. 23, exceeded such one third Gorham and Phelps were to pay for the overplus at the same rate at which they paid for the tract. There is no evidence that the inquiry as to the overplus was ever had (Report, p. 29). Gorham and Phelps, therefore, retained the tract conveyed by St. 1788,

c. 23, without any payment in addition to the sum fixed by the Indenture of March 10, 1790 (*i.e.*, £29,-146, of which the Commonwealth was left to collect £23,146 as best it might out of the securities turned over by Gorham and Phelps).

These settlements not only reaffirmed St. 1788, c. 23, *but also confined Gorham and Phelps within the boundaries therein* defined; under no circumstances could Gorham and Phelps have claimed another foot of land or any additional conveyance whatsoever. Up to March 10, 1791, therefore, there was no "Practical Construction" of St. 1788, c. 23, which in any manner enlarged their rights. In spite of their defaults they were treated not only justly but generously, in that they retained the tract described and conveyed by St. 1788, c. 23, for a far less price than they originally contracted to pay. They obtained the choicest one third of the Treaty lands for £29,146 while Morris paid £100,000 for the remaining two thirds. Under these circumstances neither they nor the defendants who claim under them, are in any position to ask that the boundary upon the shore for which Phelps and Gorham asked, which they received by St. 1788, c. 23, and which they later marked upon the soil by the Shepard survey, be extended by "construction" so as to include the beach which St. 1788, c. 23, manifestly does not convey.

II. As Matter of Law the Alleged Declaration by Massachusetts Fails to Sustain the Master's Conclusion.

The so-called practical construction described by the master (Conclusion III, Report, pp. 72–75) is based upon detached phrases taken from the resolves

and conveyances relating to the subsequent sale to Morris. As it rests wholly upon documents, it presents a pure question of law. By collating these detached phrases, the master reaches the conclusion that —

> "*Shortly after the conveyance to Phelps and Gorham in 1788,* Massachusetts declared in unequivocal terms, in acts of her legislative body relating to the disposition of the western territory, and in *subsequent* contracts and conveyances for the grants of land received from New York, that she intended to and had conveyed away *all* she had ever received from New York." (Report, p. 72.)

He deems these declarations a "practical construction" of the Treaty of Hartford and of the subsequent grants which "supports the contention that Massachusetts did not reserve or retain title to the bed of Lake Ontario, or to a strip of land between some high stage of Lake Ontario, and some low stage of the Lake." The Commonwealth asserts with confidence that when the collated phrases are replaced in the sale to Morris, of which they form a part, they do not sustain the statement that Massachusetts did declare that she had conveyed away all she had ever received from New York. On the contrary, the covenant with Ogden (Morris' assignor) of March 12, 1791 (Defts.' Ex. 34, R., p. 652–656) and the five deeds to Morris of May 11, 1791 (Defts.' Ex. 32, R., pp. 646–648; Defts.' Ex. 34, R., pp. 657–666) define by metes and bounds precisely what was conveyed to Morris, which did *not* include that part of the beach and bed of the lake which lay north of the Phelps and Gorham tract. But before replacing the collated phrases in their context

(which destroys construction placed on them by the master), the Commonwealth prefers to "demur" to the alleged declaration and assigns as grounds of demurrer (1) that the alleged declaration is not a practical construction of the Phelps and Gorham conveyance; (2) that it is insufficient in law to narrow the meaning of the Treaty or to extend the meaning of St. 1788, c. 23.

A practical construction of an instrument, *concurred in by both parties*, is of weight in determining its meaning *because they act out the intent which they intended to express.*

Stone *v.* Clark, 1 Met. 378, 381.
French *v.* Carhart, 1 N. Y. 96.
18 C. J. 262.

Thus, if a cession or compact defines a political boundary between two states, and each of those states concurs in the exercise of sovereignty and jurisdiction by the other up to a line deemed by both to coincide with that described, the line so fixed by *mutual concurrence* will be deemed the line described in the instrument.

Indiana *v.* Kentucky, 136 U. S. 479.

That case, and other cases like it, are simply examples of a practical construction of a political boundary flowing from acts *concurred in by both states.* In the absence of such concurrence *by both states*, there is no practical construction of the instrument, and the court will determine its meaning by construing the language of it.

Handley's Lessee *v.* Anthony, 5 Wheat. 374.
Alabama *v.* Georgia, 23 How. 505.

Wharton *v.* Wise, 153 U. S. 155.
Georgia *v.* South Carolina, 257 U. S. 516.
Oklahoma *v.* Texas, 260 U. S. 606.

So, also, in the case of private grants, unless both parties *concur in acting out the intent*, there is no practical construction which fixes the meaning of the instrument.

Cincinnati *v.* Gas Light & Coke Co., 53 Oh. St. 278, 286.
Hurd *v.* General Electric Co., 215 Mass. 388.
Nahaolelua *v.* Heen, 15 Hawaii 613, 615.

The principle is aptly stated in Nahaolelua *v.* Heen *supra:*

"But in order that the rule (of practical construction) may apply in a given case it must appear that the particular construction *was participated in by all the parties in interest.* . . . In Cincinnati *v.* Gas Light & Coke Co., 53 Oh. St. 278, 286, the court said: 'To have any value as a practical construction, the course of dealing should be uniform, unquestioned, *and fully participated in by both* parties.'" (Italics ours.)

Up to the moment when the five deeds to Morris of May 11, 1791, were recorded with the Secretary of State of New York that transaction was a purely private one between Morris and the Commonwealth. New York was in no sense a party to it. The resolves (not *acts*) by which that transaction was authorized (and from which the master culls the phrases upon which he bases the alleged declaration) never came to the knowledge of New York, so far as appears, nor did New York participate in them or take any action by reason of them. But each of the five deeds in which

that transaction culminated, and which define with precision the extent of the tract conveyed thereby, bounded that tract upon the international line and upon their face purported to convey and did convey a part of the bed of the lake included in the description in Article II of the Treaty. Those deeds were recorded, as required by Article XI of the Treaty, with the Secretary of State of New York in Book 23, p. 332. That record apprised New York that Massachusetts asserted title to that portion of the bed of the lake. There is not a scintilla of evidence that New York objected to or questioned that assertion of title. It was not questioned, *to the knowledge of Massachusetts*, until this suit was brought. The sporadic patent to the Bartholomay Co. in 1888, granted nearly a hundred years after the Morris deeds were recorded, and in manifest oblivion of the treaty, did not come to the knowledge of Massachusetts until New York filed her answer in this suit, and cannot be deemed an assault upon the release and cession which New York made by the express words of Article II of the Treaty. Indeed, New York could not then, and cannot now, question if she would, the instrument upon which her title to sovereignty rests.

Daniels *v.* Tearney, 102 U. S. 415, 421.
Gibson *v.* Lyons, 115 U. S. 439, 447.
Keller *v.* Ashford, 133 U. S. 610, 620.
Electric Co. *v.* Dow, 166 U. S. 489, 490.
Grand Rapids etc. Ry. Co. *v.* Osborn, 193 U. S. 17, 29.
Wall *v.* Parrott, etc., Co., 244 U. S. 407, 412.

New York is bound by her long acquiescence.

Indiana *v.* Kentucky, 136 U. S. 479.
Maryland *v.* West Virginia, 217 U. S. 577.
New Mexico *v.* Colorado, 267 U. S. 30.

Thus, the conveyance to Morris was not a practical construction of the Treaty by Massachusetts which in any way limited her rights thereunder; it was an assertion by Massachusetts of her title to that part of the bed of the lake ceded and released to her by the second article of the Treaty, brought to the knowledge of New York and acquiesced in by that state for nearly a century at least.

The conveyance to Morris was not a practical construction of St. 1788, c. 23, by the Commonwealth, and Gorham and Phelps. They were utter strangers to it and did not in any manner participate in it. Moreover, if we assume, without in any manner conceding, that Massachusetts declared in the course of that transaction that she intended to convey to Morris all of the treaty tract which she had not conveyed to Gorham and Phelps, and later declared that she had done so, that could not enlarge by one foot the boundaries defined by St. 1788, c. 23. At most it might constitute a declaration against interest tending to show title *in Morris* to that part of the shore and bed of the lake lying north of the tract which was conveyed to Gorham and Phelps by that act, and so to show an outstanding title to the *locus* in a third party. It is, however, manifestly insufficient for that purpose. The answers do not allege any such title. Moreover, a mere intruder, who relies upon an out-

standing title in a third party has the burden of proving such title beyond controversy.

> Greenleaf's Lessee *v.* Birth, 6 Pet. 302, 312.
> Greenleaf *v.* Birth, 9 Pet. 292, 295–6.

In the indenture of March 12, 1791 (Defts.' Ex. 34, R., p. 652), one course of the *eastern* boundary (R., p. 654) is a meridian falling from the international boundary until it will strike the northwest corner of the tract of land confirmed to Gorham and Phelps by the Act of November 21, 1788 (St. 1788, c. 23). The deed which conveys the 500,000 acre tract to Morris bounds the same easterly by the land confirmed to Gorham and Phelps by the Act of November 21, 1788 (Defts.' Ex. 32, R., pp. 646, 647). The supposed declaration, therefore, is wholly insufficient either to enlarge the grant to Gorham and Phelps made by St. 1788, c. 23, or to establish title to the locus in Morris.

Nor can the supposed declaration create any estoppel in favor of defendants. It can work no estoppel *by deed* since they are strangers to the transaction and do not claim under Morris.

> Deery *v.* Cray, 5 Wall. 795, 802.
> Eldred *v.* Bell Tel. Co., 119 U. S. 513, 522.

It works no estoppel *in pais* for there is not a scintilla of evidence that, prior to the bringing of this suit, the defendants ever knew of or relied upon the resolves from which the master derives the alleged declaration.

> Oklahoma *v.* Texas, 268 U. S. 252, 257.

Moreover, their own title to lot 20 and to lot 21, respectively, was concededly of record, and that record included (1) the Hartford Treaty, (2) St. 1788, c. 23, (3) the partition deed of 1804, and (4) the Shepard survey. (Stipulation, p. 739, pars. 1, 3, 5, 6.) That record rebuts any estoppel *in pais* as to the extent of their own title.

> Brant *v.* Virginia Coal & Iron Co., 93 U. S. 326, 327.
> Crary *v.* Dye, 208 U. S. 515, 521.
> Oklahoma *v.* Texas, 268 U. S. 252, 257.

Even if they had examined the Morris transaction before they lawlessly seized the *locus*, the deeds to Morris so clearly defined the extent of the tract conveyed to him that they could not have been misled; they certainly could not excuse their lawless seizure by an estoppel *in pais* laboriously constructed from chosen phrases culled from the several resolves.

These considerations exhaust every possible application of the alleged declaration that Massachusetts intended to convey and had conveyed to Morris all of the Treaty tract not theretofore conveyed to Gorham and Phelps, even if we assume, without conceding, that such a declaration can be extracted from that transaction. It is not a practical construction of St. 1788, c. 23, because neither Gorham nor Phelps participated in the Morris transaction. It cannot enlarge the conveyance made by St. 1788, c. 23, because it does not relate to that act. It cannot establish any title to the *locus* in Morris because the indenture of March 12, 1791, and the deed to the 500,000 acre tract rebut that contention. It creates no estoppel

by deed because neither Gorham and Phelps nor the defendants claim through Morris. It creates no estoppel *in pais* for the several reasons just stated. As matter of law, therefore, it is without significance and cannot carry the burden which the master in his third conclusion places upon it.

III. The Alleged Declaration is not Sustained by the Documents Referred to by the Master.

On March 8, 1791, the Legislature by Res. 1790, c. 121 (Defts' Ex. 31) appointed a committee consisting of Samuel Phillips, Nathaniel Wells, David Cobb, William Eustis and Thomas Davis (the same persons then engaged in negotiating the final settlement with Gorham and Phelps by the Indenture of March 10, 1791 (Defts'. Ex. 73, R., p. 620) except that Wells replaced Walter Spooner) "with full power and authority to bargain and sell to Samuel Ogden" for £100,000

"all and singular the right of pre-emption and all other the title and interest of this Commonwealth in & unto all that Tract of Land lying in the State of New York the right of pre-emption whereof the State of New York ceded granted released & confirmed to this Commonwealth their Grantees and the heirs and Assigns of such Grantees forever saving and excepting such part or parts of said Tract the right of preemption whereof this Commonwealth has ceded and granted to the United States of America and also saving & excepting such part or parts of the same Tract the pre-em(p)-tive right to which now belongs to Nathaniel Gorham & Oliver Phelps Esqrs. their heirs or Assigns by virtue of any Grant or Confirmation from this Commonwealth, however the same Tract is or may be bounded or described & also

reserving one undivided sixtieth part of sd. Tract excepting such parts thereof as belong to the said United States and said Gorham & Phelps by Virtue of any Cession from this Commonwealth . . ."

The contemplated bargain was conditioned upon payment of the designated sum in specified instalments and the committee was authorized to execute a covenant to convey when the Indian claims should be extinguished.

Of this resolve it is sufficient to say that it is a mere authority to sell, not even an agreement to sell. The agreement was to be drawn and executed by the committee. That agreement necessarily fixes the extent of the premises to be conveyed — provided, of course, that it does not exceed the authority conferred by the resolve.

On March 12, 1791 (two days after the final indenture with Gorham and Phelps), the committee and Samuel Ogden executed an Indenture (Defts'. Ex. 34, R., p. 652 middle) by which they covenanted for the sum of £100,000, payable in certain designated instalments, to execute to Ogden (R., p. 653):

"a good and valid deed of the pre-emptive, and all other right and title which the said Commonwealth of Massachusetts hath to the premises which are bounded and described as follows — to wit — All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie; and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east

from the northern termination of said streight or waters, and which premises to be conveyed, are to extend on the line of said tract belonging to the state of New York to the south shore of Lake Ontario, then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending until/ a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth of Massachusetts by an Act of the Legislature thereof passed the twenty first day of November, Seventeen hundred and eighty eight. And the said premises to be bargained & sold as aforesaid by virtue of the powers, contained in Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to the said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so upon that line westwardly to the place of beginning where that line meets the tract lately ceded by the said United States to the said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof . . ."

On May 11, 1791, Ogden assigned all his rights under said indenture to Robert Morris (R., p. 656 middle). On the same day the committee executed five deeds, one of which conveyed to Morris a described tract of land containing 500,000 acres, for a consideration of £45,000, and the other four of which each conveyed a described tract of 800,000 acres for a consideration of £15,000 each for the first three tracts and a consideration of £10,000 for the last or most western tract. Each deed recited that by the Resolve of March 8, 1791, the committee was authorized to sell the lands therein described (quoting the description); that pursuant to that authority it executed the Indenture of March 12, 1791; and that

Ogden had assigned to Morris all his rights under said indenture.

The deed for 500,000 acres (Defts.' Ex. 32, R., p. 646) which was forthwith delivered, and also was forthwith recorded with the Secretary of State of New York on August 17, 1791 (R., p. 648), described the premises thereby conveyed as follows (R., p. 647):

"the preemptive right & all other right title & interest which the said Commonwealth hath to a certain tract or parcel of land being part of the Territory above described, which parcel contains about Five hundred thousand Acres more or less & is bounded as follows to wit. Westerly by a Meridian line drawn from a point on the North Line of the State of Pennsylvania twelve miles west of the South west corner of the Land confirmed to Nathaniel Gorham & Oliver Phelps to the Line in Lake Ontario which divides the Dominion of the King of Great Britain & the United States, Northerly by said dividing line easterly by the Land confirmed to Nathaniel Gorham & Oliver Phelps by the Legislature of the Commonwealth of Massachusetts by An Act passed November the twenty-first One thousand seven hundred & eighty-eight & Southerly by the said North line of the State of Pennsylvania, reserving out of the same granted premises one undivided sixtieth part thereof. . . ."

The other four deeds were placed in escrow to be delivered when Morris should pay the stipulated consideration (R., pp. 659, 661, 663, 666). The descriptions (moving from east to west) are as follows (R., pp. 658, 660, 663, 665):

"the pre-emptive right & all other right, title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract & territory above

described, which parcel contains about eight hundred thousand acres more or less, and is bounded as follows, to wit. Beginning on the north line of Pennsylvania at a point west from the southwest corner of land confirmed to Nathaniel Gorham and Oliver Phelps esqrs and twelve miles distant therefrom, and from said point running west on said North line of the said State of Pennsylvania sixteen miles, from thence north on a meridian line to the dividing line between the United States and the dominion of the King of Great Britain, thence easterly on said dividing line untill it comes to a point, from which a meridian line will fall upon the point of beginning, and on the same meridian line to the place of beginning, reserving out of the same granted premises one undivided sixtieth part thereof: . . ."

"the pre-emptive right, and all other right title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract and territory above described, which parcel contains about eight hundred thousand acres, more or less, and is bounded as follows, to wit: Beginning on the north line of the State of Pennsylvania at a point west from the southwest corner of the land confirmed to Nathaniel Gorham and Oliver Phelps esquires twenty-eight miles distant therefrom — thence running west on the said Pennsylvania line sixteen miles, then north to the line in the lake Ontario, which divides the dominions of the King of Great Britain from the United States of America, then easterly by that line to a point, from whence a meridian line will fall on the point of beginning, thence on the same meridian line to the place of beginning, reserving out of the same granted premises, one undivided sixtieth part thereof. . . ."

"the pre-emptive right and all other right title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract & territory above

described, which parcel contains about eight hundred thousand acres more or less and is bounded as follows to wit, beginning on the north line of the State of Pennsylvania at a point west from the southwest corner of land confirmed to Nathaniel Gorham & Oliver Phelps esquires, forty four miles distant therefrom, thence running west on the said Pennsylvania line sixteen miles, then north to the line in the lake Ontario which divides the dominions of the King of Great Britain from the United States of America, then easterly by that line to a point from whence a meridian line will fall on the point of beginning, then on the same meridian line to the place of beginning, reserving out of the same granted premises one undivided sixtieth part thereof; . . ."

"the pre-emptive right, and all other right, title and interest which the said Commonwealth hath to a certain tract or parcel of land, being part of the tract and territory above described, which parcel contains about eight hundred thousand acres more or less, and is bounded as follows to wit, beginning at a point on the north line of the State of Pennsylvania sixty miles west of the southwest corner of the land confirmed to Nathaniel Gorham and Oliver Phelps from said point running west until it meets the land ceded by the Commonwealth of Massachusetts to the United States of America and by said United States sold to the State of Pen-sylvania, thence northerly by the land ceded as aforesaid to Lake Erie, from thence north easterly by Lake Erie to a tract of land lying on the easterly side of the streight of Niagara belonging to the State of New York, thence northerly by said tract, to a line in Lake Ontario which divides the dominions of the King of Great Britain, and the said United States, thence easterly on said dividing line to a point from whence a meridian line will fall on the point of beginning, thence southerly on the same meridian line to the place of beginning, together with the right of pre-emption which the Commonwealth hath to all Islands or Waters in

Lake Erie, by virtue of any cession from the State of New York to said Commonwealth, reserving out the same granted premises one undivided sixtieth part thereof. . . ."

The committee prior to June 17, 1791, made a full written report of its doings to the Legislature (Defts.' Ex. 34, R., pp. 650–652) to which were attached:

(1) Copy of the Indenture of March 12, 1791.

(2) Copy of Assignment by Ogden to Morris.

(3) Copies of the four deeds of May 11, 1791, which were placed in escrow.

This report was accepted by Res. 1791, c. 65, p. 416 (approved June 17, 1791), which reads as follows (omitting title):

"On the report of the Committee appointed by the general court on the 8th day of *March* last, with authority to sell & convey to *Samuel Ogden* Esqr., his heirs & assigns, the right of pre-emption, & other the title & interest of the Commonwealth to that part of the lands lying in the state of *New-York*, the right of pre-emption whereof the said state of *New-York* had ceded to this Commonwealth, & which had not been by them before otherwise ceded or granted.

Resolved, That the same be, & hereby is approved, & that the several papers described in the said report, and accompanying the said Report after the same shall have been recorded in the Secretary's office of this Commonwealth, be deposited in the Treasurer's office of the Commonwealth, to be put on file with the other papers there already deposited relative to the same subject."

By Res. 1792, c. 30, p. 157 (approved June 20, 1792), the Commonwealth released the undivided sixtieth part of the Morris tract theretofore reserved, said resolve (omitting title) reading as follows:

"Whereas the General Court of the Commonwealth of Massachusetts upon the first day of april in the year of our Lord one thousand seven hundred and eighty eight by a certain Resolve of that Date did, agree to grant, sell and convey to Nathaniel Gorham and Oliver Phelps Esquires all the Right Title and demand which the said Commonwealth had in and to the Western Territory ceded by the state of New York to the Commonwealth by a deed executed by the Commissioners of the said state on the sixteenth day of December 1786 with such exceptions and Limitations as are expressed. As well in acts and proceedings of the said General Court as those of their agents and Committees; and whereas by a certain Indenture of agreement, made between the said Commonwealth and the said Gorh(*am*) and Phelps on the ninth day of June in the year of our Lord one thousand seven hundred and ninety the said Gorham and Phelps reconveyed to the said Commonwealth a certain part of the same Territory according to the Conditions of the Same Indenture reference to the same being had. And whereas the said Commonwealth by Samuel Phillips Nathaniel Wells David Cobb William Eustis and Thomas Davis Esquires agents for that purpose especially appointed on the Eleventh day of may in the year of our Lord one thousand seven hundred and ninety one did sell and convey to Robert Morris Esqr. all and singular the right & Title which the said Commonwealth had to the same part of said territory so reconveyed by the said Gorham and Phelps to the said Commonwealth according to the tenor of the Deed for that purpose executed reference to the same being had, but reserving amongst other things one undivided sixtieth part of the same Tract so reconveyed by the said Gorham and Phelps as aforesaid, which same one sixtieth part was so reserved because the said Gorham and Phelps had previously contracted to convey the same to John Butler and (and) it being represented to this Court that Robert Morris of Philadelphia in the state of Pensylvania Esquire has purchased the said Sixtieth part of the assigns of the said John Butler and he having

Petitioned the General Court of the said Commonwealth for a release of the same from the Reservation aforesaid:

It is therefore *Resolved* that the said Commonwealth will and hereby doth release and convey to the said Robert Morris his heirs and assigns forever all the right title and Interest which the said Commonwealth hath or could have, by virtue of the same reconveyance of the said Gorham and Phelps or by virtue & force of the said reservation, to the said one undivided Sixtieth part of the said Tract reserved as aforesaid, so that he the said Robert Morris his heirs and assigns shall hold and enjoy the same in the same manner and to all such uses as the said Commonwealth could hold the same by virtue of the same reservation; but the said Commonwealth doth not warrant the same against any claim which may arise by means of any conveyance from the said Gorham & Phelps or either of them or from any Person claiming under them or under either of them."

Here then is the material from which is constructed the supposed declaration that Massachusetts "had intended to and had conveyed away *all* she had ever received from New York" (Report, p. 72). It will be immediately observed that when set back in their context the detached phrases upon which the Master relies (Report, pp. 73–74) take on a wholly different complexion. The Resolve of March 8, 1791, is a mere authority to agree to convey, by an instrument which the committee is authorized to prepare and execute. Manifestly the Indenture of March 12, 1791, and the five deeds of May 11, 1791, determine what the committee actually agreed to convey and did convey; and neither the agreement to convey nor the deeds themselves include the shore and bed of the lake north of the Phelps and Gorham tract.

They do embrace all the *upland* which had not been conveyed to Gorham and Phelps (except the undivided sixtieth later released by Res. 1792, c. 30) and it is to this that the phrases relied upon by the Master manifestly refer. Res. 1791, c. 65, which approves the report of the committee and directs that the several papers described in it (*i.e.*, the Indenture and the four deeds) be recorded in the Secretary's office, manifestly is not intended to enlarge and does not enlarge the very instruments which it approves and orders to be recorded. Yet if the description of the report made in St. 1791, c. 65, were taken literally, it would by implication eliminate the undivided sixtieth part reserved by the Indenture and each of the five deeds. That construction of that Resolve is excluded by the express release of that sixtieth part *subsequently* made by Res. 1792, c. 30. Res. 1792, c. 30, gives no support to the Master's conclusion; the reference to the lands conveyed to Morris is expressly qualified by the phrase "according to the tenor of the deed for that purpose executed reference to the same being had." When the detached phrases upon which the supposed declaration rests are replaced in their context (the sale to Morris) the supposed declaration vanishes, and apart from that context it has no existence.

Even if the supposed declaration "that Massachusetts had intended to and had conveyed away *all* that she had ever received from New York" had had any existence in fact it would have been insufficient in law to establish the "practical construction" advised by the Master. It is not a practical construction of the Phelps and Gorham grant because they did not par-

ticipate in it or, apparently, ever hear of it. It is not a practical construction of the Morris grants because the detached phrases on which it is based occur in that transaction before it was complete and are controlled by the descriptions in the grants themselves. The boundaries of the Phelps and Gorham grant and of the Morris grants are fixed by calls for monuments and adjoiners. Calls for monuments control calls for course and distance.

Brown *v.* Huger, 21 How. 305, 321.
McIver *v.* Walker, 9 Cranch. 173, 177.
Higueras *v.* United States, 5 Wall. 827, 835.
United States *v.* State I. Co. 264 U. S. 206, 211.
Temple *v.* Benson, 213 Mass. 128, 132.
Yates *v.* Vandebogert, 56 N. Y. 526, 531.

The same rule applies to calls for adjoiners — *e.g.*, Easterly on the tract confirmed to Gorham and Phelps by the Act of Nov. 21, 1788.

Bartlett, etc., Land Co. *v.* Saunders, 103 U. S. 316, 319.

If calls for monuments or adjoiners control calls for course and distance in the instrument itself, they plainly control a supposed declaration such as this. It cannot enlarge the description in either grant, especially as grants by a state are construed against the grantee, who takes nothing but what is conveyed by clear and explicit language.

Slidell *v.* Grandjean, 111 U. S. 412, 437.
United States *v.* Oregon etc. R.R., 164 U. S. 526, 539.

Stoneham *v.* Commonwealth, 249 Mass. 112, 117.
People *v.* New York & S. I. F. Co., 68 N. Y. 71, 77.

In the sunlight of the facts, the supposed "practical construction" vanishes like frost on a window pane.

IV. Comparison of the Several Grants.

The master suggests that at this time "lake" and "shore" were used synonymously, "the choice being determined by convenience of expression." (Report, p. 66.) Such was not the case. By the Ordinance of 1641–47 (Plffs.' Ex. 64, R., p. 608) the line of riparian ownership in Massachusetts was extended from high water mark to low water mark, thereby including the shore, beach or flats.

Shively *v.* Bowlby, 152 U. S. 1, 18.

For 140 years prior to the passage of St. 1788, c. 23, the distinction between a call for the shore or beach (*i.e.*, *land*) as a terminal monument and boundary and a call for the *water* was well known and understood. It is illustrated by a number of Massachusetts cases which have construed a call for the shore in ancient deeds made prior to and contemporary with St. 1788, c. 23, and held that it did not include the beach or bound the tract conveyed upon the water.

Litchfield *v.* Scituate, 136 Mass. 39 (1666 and 1695.)
Saltonstall *v.* Long Wharf, 7 Cush. 195, 200 (1771).

Tappan *v.* Burnham, 8 Allen 65 (1787).
Storer *v.* Freeman, 6 Mass. 435 (1790).
Litchfield *v.* Ferguson, 141 Mass. 97 (1795).

Under these circumstances, the suggestion that "shore" and "lake" were synonymous, and that the Legislature, in enacting St. 1788, c. 23, meant "lake" when it said "shore" is inadmissible.

The master, however, suggests (Report, p. 66) that such a confusion of thought exists in the Treaty itself in connection with the western boundary of the tract ceded and released by Article II. It would be surprising were such the fact, for two of the Massachusetts commissioners were Theophilus Parsons, who later became Chief Justice of Massachusetts, and wrote the opinion in the leading case of Storer *v.* Freeman, 6 Mass. 435, and James Sullivan, who later became Attorney General of Massachusetts and a member of the committee which negotiated the settlement of June 9, 1790, with Gorham and Phelps (Defts.' Ex. 31, R., pp. 635, 637) by which Gorham and Phelps were confined within the boundaries described in St. 1788, c. 23. But it is not the fact. The pertinent words of Article II are as follows:

"thence westerly and southerly along said (international) boundary line to a meridian which will pass one mile due East from the Northern termination of the waters between Lake Ontario and Lake Erie, *thence south along the said meridian to the South Shore of Lake Ontario,* thence, on the Eastern side of said Streight by a Line always one mile distant from and parallel to the said Streight *to Lake Erie.*"

A moment's examination will show the precision of this description. The western boundary of the

treaty tract between the international boundary in Lake Ontario and the margin of Lake Erie is defined by two courses each drawn to a monument. The first course is *south* along the designated meridian "to the *South Shore* of Lake Ontario." This is an express recognition *by both states* that Lake Ontario does possess a shore — the master and the defendants to the contrary notwithstanding. As the designated course is moving due *south* across the lake toward the land, the first land touched is the northern or *water* side of the south shore (*i.e.*, the line where shore and water meet). If the line had (as in St. 1788, c. 23) been drawn *northerly* across the land "to the shore", it would first touch the shore upon the *south* or *land* side of the shore; namely, where beach and upland meet. The difference in the direction of the course, and of the point whence the course starts, explains why in each case a course drawn "to the shore" strikes the shore upon opposite sides, and stops there. Now a glance at the map (Report, p. 17) shows that the Niagara River does not run due north and south. Hence a line one mile east of it and always parallel thereto cannot run due north and south. That is why the south shore of Lake Ontario at the point where the designated meridian and the water line intersect is fixed as the starting point of the second course. That course is to run to the margin of Lake Erie. Hence the terminal monument called for *is not the shore* of Lake Erie, but *the lake itself*. Thus the description in the treaty does not show (as the master suggests) that "shore" and "lake" were used synonymously. On the contrary, the distinction between a call for the "shore" and a call for the lake is most

carefully preserved by the difference in the language of these successive courses. This is the more significant when we recall that the Indian deed to Gorham and Phelps was framed by a conveyancer who also uses technical words with delicacy and precision (cf. the contrast between the calls for "the waters of the Genesee River" in the western line, and the call for the "shore" as the terminal monument at the *north* end of the western line, and as the northern boundary) and who manifestly had the Treaty before him.

The language of St. 1788, c. 23, has been sufficiently discussed. But it may not be without worth to contrast the language of that act with the description in the Indenture of March 12, 1791, and with the description in the most western of the Morris deeds.

The Indenture of March 12, 1791 (Defts.'s Ex. 34, R., p. 652) covenants to convey a tract of land bounded and described as follows (R., p. 653):

"All that tract and parcel of land bounded westerly in part upon lands lately ceded by the United States of America to the State of Pennsylvania and in part by Lake Erie; and so extending northerly along upon a tract of land belonging to the State of New York, which tract lies on the eastern side of the streight or Waters of Niagara, and from those waters extending to a meridian line, one mile due east from the northern termination of said streight or waters, and which premises to be conveyed, are to extend on the line of said tract belonging to the state of New York to the south shore of Lake Ontario, then bounding northerly on that part of Lake Ontario where the line runs between the dominions of the King of Great Britain and the said United States & upon that line extending untill a meridian line falling from the same will strike the northwest corner of the tract of land confirmed to Nathaniel Gorham & Oliver Phelps by the said Commonwealth

of Massachusetts by an Act of the Legislature thereof passed the twenty first day of November, Seventeen hundred and eighty eight. And the said premises to be bargained & sold as aforesaid by virtue of the powers, contained in Resolve aforesaid are to extend, adjoining easterly upon the same tract confirmed to said Gorham and Phelps to the north line aforesaid of Pennsylvania, and so upon that line westwardly to the place of beginning where that line meets the tract lately ceded by the United States to the Said State of Pennsylvania, reserving out of the same lands to be conveyed one undivided sixtieth part thereof, . . ."

This description contains two significant features. The northern boundary is the international line, and runs along that line

"until a meridian line falling from the same will strike the northwest corner of the tract confirmed to Nathaniel Gorham and Oliver Phelps" by the Act of November 21, 1788 (St. 1788, c. 23).

When the committee intended to bound northerly upon the international line, it said so in language not to be misunderstood. Even more significant is the call for the "northwest corner" of the tract confirmed to Gorham and Phelps by the act of November 21, 1788 (St. 1788, c. 23). This is a call for an adjoiner, which, like a monument, controls both course and distance.

> Bartlett, etc., Land Co. *v.* Saunders, 103 U. S. 316, 319.

If the description in the act and the course and distance in the call had conflicted, the corner *as described in the act* would prevail and draw the line to itself;

the call does not draw the designated corner to the point described in the call.

> Bartlett, etc., Land Co. *v.* Saunders, 103 U. S. 316, 319.

See also Veve *v.* Sanchez, 226 U. S. 234, 240.

The call for this northwest corner, therefore, confirms it anew *at the point described in the act;* that is, at the point where the western line described in the act meets the landward margin of the shore.

The master contrasts that part of the western line of the tract described in this Indenture of March 12, 1791, which bounds "in part by Lake Erie", with that course in the same line which runs northerly "to the south shore of Lake Ontario, then bounding northerly upon" the international line, and suggests that here the words "to the south shore" must carry the line "to the waters of the lake" because otherwise there would be a hiatus in the description. (Report, p. 70.) Taking this portion of the description *by itself*, there is the appearance of a hiatus between the point where the course which runs "to the south shore of Lake Ontario" ends, and the international line, since the next words are "then bounding northerly" upon that line. This seeming hiatus cannot be bridged by the simple expedient of extending the line across the shore to the water's edge by a forced construction of the word "shore". The rest of the gap would still have to be filled by implying a meridian running the rest of the way to the undoubted northern boundary upon the international line. Under such circumstances, the natural thing to do would be to imply a meridian running directly

from the terminus of the course and to the international line, not to imply a course across the shore, and then as a second course imply the meridian from that point. The master's solution does not meet the needs of the case.

There is in fact no hiatus at all. The master has overlooked (and likewise omitted from his quotation, Report, p. 70) another call in the description, namely, the course which extends from Lake Erie "to a meridian line one mile due east from the *northern* termination of said Streight or waters." This supplies the missing meridian which begins at the water side of the shore and extends to the international line. As this call carries the line *to that meridian*, the whole description becomes in effect "to the south shore of Lake Ontario, to the Lake." It is a double call (like "to the sea or beach") which, by express words, marks the terminus of the course at the point which will satisfy both monuments in the call, namely, the point where shore and water meet.

> Doane *v.* Wilcutt, 5 Gray 328, 335.
> Saltonstall *v.* Proprietors of Long Wharf, 7 Cush. 195.

This disposes at once of the supposed hiatus and of the forced construction of the word "shore" suggested by the master.

The whole point is trivial. No boundary upon the shore is involved. The single question is as to how the western line shall be drawn to the international boundary. It would not be worth comment if the master had not referred to it. The awkward form of this portion of the description in the indenture was per-

ceived and corrected in the most western deed to Morris, by eliminating the reference to the shore altogether. That deed draws the line (R., p. 665):

"thence northeasterly by Lake Erie to a tract of land lying on the easterly side of the streight of Niagara belonging to the State of New York, thence northerly by said tract to" the international line.

The deed last referred to, however (R., p. 665), has a significant call in the description, which is worth comment, namely:

"northerly . . . to Lake Erie, from thence northeasterly by Lake Erie."

When the intention was to make Lake Erie the terminal monument and boundary, that intention was expressed aptly and clearly. That description in the deed to Morris may well be contrasted with the description furnished by Gorham and Phelps to the Legislature and at their request used by it in St. 1788, c. 23, viz.:

"thence running in a direction northwardly . . . to the shore of the Ontario Lake, thence eastwardly along said shores" etc.

The difference in language indicates a plain difference in intention.

What prompted Gorham and Phelps to take the Indian deed in the form in which they did and to request a conveyance by Massachusetts in the same words cannot certainly be known. It may be that they did not care to pay any additional sum to the Indians to extinguish a more than doubtful claim to the beach

and bed of the lake. It may be that they were utterly indifferent to a beach which, generally speaking, lay at the foot of high precipitous bluffs. They may have regarded the beach as worthless. (See Litchfield *v.* Scituate, 136 Mass. 39, 48.) On the other hand, they and the Commonwealth may both have desired that the Commonwealth retain this part of the beach and bed of the lake in connection with the equal fishing rights reserved by Article VI of the Treaty both to settlers upon the tract and to Massachusetts citizens in general. An abstract right to fish is of little practical value without a place to dry nets and fish, store tackle, and the like.

> Mercer *v.* Denne, 1905, 2 Ch. 538.
> Sloan *v.* Biemiller, 34 Oh. St. 492.
> McClellan *v.* McFadden, 114 Me. 242.

Retention by Massachusetts of a reasonable amount of bed secured the right to build fish weirs or traps.

> Alaska Pacific Fisheries Co. *v.* United States, 248 U. S. 78.

If Gorham and Phelps had obtained title to the beach and bed of the lake (*non constat* that Massachusetts would have granted them) both would have been taxable in their hands and liable to loss by adverse possession. If Massachusetts kept them, she was exempted from tax and protected from adverse possession by the Fourth and Seventh Articles of the Treaty, and as a practical matter they would be available for use by all. It may be that some or all these considerations were operative.

Be that as it may, Gorham and Phelps took from the Indians a deed which ran the western line "to the shore of the Ontario Lake" and ran the northern line "thence eastwardly along the shores of said Lake". They requested and obtained from Massachusetts a grant by the same description. They defaulted in their payment to Massachusetts and obtained a generous settlement which confined them within those boundaries. By the Shepard survey in 1803 they drew upon the soil their construction of St. 1788, c. 23. That survey bounded lots 20 and 21 upon the beach, not upon the lake. Pulteney, under whom the defendants claim lots 20 and 21, took conveyance of those lots in 1804, according to that survey, which has been the basis of conveyance ever since. The Treaty, the statute, the Shepard survey and the partition deed of 1804 are all of record. The meaning of the statute and the construction of it by the Shepard survey are plain and unambiguous, so that all who run may read. They are contrasted with other deeds plainly and aptly expressing a different intent. The statute is a grant from the state which is to be construed in favor of the state; nothing passes but what is conveyed in clear and explicit language.

United States *v.* Oregon etc. R.R., 164 U. S. 526, 539.
Stoneham *v.* Commonwealth, 249 Mass. 112, 117.

The plain meaning of the statute is not to be modified by judicial legislation (Ebert *v.* Poston, 266 U. S.

548, 554), nor is it to be changed or overturned by any supposed but unexpressed intent of the grantees.

Geneva *v.* Henson, 195 N. Y. 447, 464.
New York Life Ins. Co. *v.* Hoyt, 161 N. Y. 1, 8.
Muldoon *v.* Deline, 135 N. Y. 150, 153.
Rockwell *v.* Baldwin, 53 Ill. 19.
Whitmore *v.* Brown, 100 Me. 410, 413.

As construed by the survey, it does not bound either lot 20 or lot 21 upon the water and, therefore, confers no right to accretions.

Jones *v.* Johnston, 18 How. 150.
Bates *v.* Illinois, 1 Black, 204, 208.
Banks *v.* Ogden, 2 Wall. 57, 59.
People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597.
People *ex rel.* Banks *v.* Colgate, 67 N. Y. 512.
Cook *v.* McClure, 58 N. Y. 437.
Oxline *v.* Shaw, 35 Fla. 305.
Sweringen *v.* St. Louis, 151 Mo. 348, 355.

Point Four.

THE BARTHOLOMAY COMPANY AND THE NEW YORK CENTRAL RAILROAD SEIZED AND FILLED THE LOCUS WITHOUT RIGHT AND WITH NOTICE OF THE TITLE OF THE COMMONWEALTH.

I. The Formation of the Locus and its Appropriation by Defendants.

The *locus* lies north of the north line of lots 20 and 21, as surveyed by Shepard, and at the time of that survey was beneath the waters of the lake. In 1828 or 1829 Capt. T. W. Maurice, of the United States Corps of Engineers, made a map (Defts.' Ex. 5, atlas), of the mouth of the Genesee in connection with a project to improve the navigation of the river by building two jetties northward into the lake. The projected jetties were built in 1833 or 1834. (Abbot, R., p. 573). Between that time and 1902 the War Department maps show that the water line of the beach has gradually advanced about 1,400 feet northward beyond the water line shown by Maurice in 1829. (Defts.' Ex. 2, 44, 43, 42, atlas; Plff.'s Ex. 62, 61, atlas.)

The plaintiff desired to correlate the data shown by these War Department maps, with the map of the locus and the Shepard line made by Arthur Vedder, Superintendent of Surveys of the City of Rochester (Plffs.' Ex. 4, atlas) and with the data as to the height to which the beach formed naturally (Plffs.' Ex. 54, 46, atlas), as shown by test pits dug upon the premises. Through Gen. Frederic V. Abbot a three page map (Plffs.' Ex. 62, atlas) was located in the War Department, which showed upon the same scale (1) the Maurice map of 1828, which is identical with the Maurice

map of 1829, except that it omits the *projected* jetties, which differ from those actually built; (2) a map made by Pettes in 1844 showing the jetties as actually constructed; (3) a map made by Major Wilson in 1874, likewise showing the jetties. This formed the connecting link. Gen. Abbot then reduced the several maps to the same size as these three by photostat process, and by superimposing the jetties was able to produce a *composite map* (Plffs.' Ex. 61, atlas), which accurately correlated this data. (Abbot, R., pp. 569 to 576.)

We particularly call attention to this composite map (Plffs.' Ex. 61, atlas), since it fixes the position of the water line of 1829 in relation to the Shepard line. There is no evidence that prior to the building of the jetties there was any material change in the water line of the beach. In other words, there is no evidence that the water line shown by Maurice in 1829 (Plffs.' Ex. 61, atlas) differs from the water line of 1788, or the water line in 1803, when Shepard made his survey. Gen. Abbot's map shows the Shepard line as just within the south or *landward* margin of the "sand beach" shown by the Maurice map of 1829. This is a striking corroboration from an independent source of the calls in the Shepard notes, and confirms Shepard's statement that he ran his north line where the notes say he did, namely, along the *landward* margin of the beach. As the premises in dispute lie almost entirely north of the water line of 1829, only a small portion of them falling within the beach, it is clear to demonstration that they were beneath the waters of the lake both in 1803 and in 1788.

The height to which nature brought these accre-

tions to the beach, originally presented a serious issue in the case. The bill was brought in 1822. At that time there were two intimations by the Court of Appeals of New York that the riparian line upon *navigable* lakes was high water mark (People *ex rel.* Burnham *v.* Jones, 112 N. Y. 597, 606, and Matter of the City of Buffalo, 206 N. Y. 319, 324). If that intimation had crystallized into law, the issue of accretion would have turned upon the question whether nature had gradually and imperceptibly made any additions to lots 20 and 21, beginning at high water mark and extending continuously from that point at that level.

Scratton *v.* Brown, 4 Barn. & Cress. 485.
Trustees of Easthampton *v.* Kirk, 84 N. Y. 215, 218.
Lambert *v.* Vare, 88 N. J. Eq. 81, 88.
Bennett *v.* National Starch Co., 103 Ia. 207.
Park Commissioners *v.* Taylor, 133 Ia. 453, 461.
Wallace *v.* Driver, 61 Ark. 429, 431, 435.
Winford *v.* Griffin, 1 Fed. 2d, 224, 225.

Much of the evidence was directed at this issue. When the hearings in this case were nearly completed, the Court of Appeals decided in Stewart *v.* Turney, 237 N. Y. 117 (1923), that the riparian line upon navigable lakes (*i.e.*, the line which in law is in contact with the water and carries a right to accretions) was low water mark. This reduced the issue of accretions in this case to a pure question of law, namely, whether St. 1788, c. 23, bounded the premises upon low water mark. As it clearly does not, the

defendants have, as matter of law, no right to accretions. The accretions proved in this case belong to the Commonwealth (1) as the owner of the bed of the lake upon which they formed, (2) as the owner of the beach which alone is in contact with the water. We may, therefore, summarize in a very general way the evidence as to the precise level nature carried the additions made to the beach.

The premises showed that artificial fill must have been placed upon the beach north of the Shepard line. In order to distinguish the artificial fill from the natural material, the Commonwealth dug over 40 test pits. These pits disclose that the material nearest the surface was a yellow loamy sand of varying depth, which rested in some cases directly upon the lake sand itself, and in some cases rested upon a layer of black marsh silt, below which was gray lake sand. (See Plff's.' Ex. 8 to 54, inclusive, atlas.) When the measurements made in the pits were correlated, they showed that the yellow loamy sand extended downward in the interior of the locus to level 247 to 247½ above mean tide at New York, the levels being taken from a standard government bench mark, and that the lake sand level gradually sloped *upward* toward the north to the top of a ridge or bar, at about 249, and then sloped downward gradually to the lake. This bar or ridge was some distance north of the Shepard line and was divided from it by the depression or hollow. There was much human testimony that the depression or hollow was, in part at least, a swamp.

At an early stage in the case, *before* the data as to the pits was proved by three engineers called by the Commonwealth, Gen. F. V. Abbot, Charles R. Gow and

John N. Ferguson, the defendants put on, out of order, William C. Gray, the engineer who "developed" the parcel north of lot 21 for the Railroad, in 1884 (hereafter called for convenience the Railroad parcel), and the parcel north of lot 20 for the Bartholomay Company in 1885 (hereafter called for convenience the Bartholomay parcel).

On that occasion, Mr. Gray testified on direct, in part, that working under Daniel McCool, as resident engineer of the New York Central, he, in 1873, extended the Charlotte branch of the railroad from the station down to the beach (R., p. 170); that the surface was rough wild land (R., p. 171); that there was "no marsh land, but wet, as the water percolated through from the lake" (R., p. 172); that where the wet places were he put in old ties and then filled them over with other material (R., p. 172); that "we just filled in the hollows and cut off the ridges so as to get a straight grade" (R., p. 172); that in 1884 he replaced the straight track with a balloon track (R., p. 172); that the general nature of the soil was all sand (R., p. 174); that there were "no marshy spots, there were wet places between the ridges where the land was lower down than the tops of the ridges and where the water would filter through from the water of the lake" (R., p. 174); that there was a ditch called the McIntyre ditch which was dug to take the water of the creek which comes down southwest of Lake Avenue (Shepard's Main Street), (R., p. 174; that pipes put in to replace this ditch extended from west of Lake Avenue through to the river (R., p. 173); and that he replaced the ditch with two strings of 36 inch tile (pipe) over which he carried his track. (R., p. 173.)

On cross examination on this occasion Mr. Gray testified, in part, that some of the ties might have been laid in water (R., p. 189); that other ties were not laid in water which existed on the surface; there were ties laid after the double line of pipe was put through, the double line of pipe to carry the water from the creek to the river (R., p. 189); that they first drained the water (R., p. 190); that there was water there before the double line of pipe was laid (R., p. 190); that some of the ties were thrown in on places where there was water (R., p. 190); that this was to prevent the waters of the lake from returning and making his fill in settle down farther (R., p. 190); that he had this clearly in mind as part of his plan (R., p. 190); that he at that time represented the New York Central Railroad (R., p. 190); that he was being used by the New York Central Railroad to devise the plan of the fill in and of the construction of the Railroad (R., p. 191); and that the plan which he had in making this fill, as he had just described it, was made pursuant to his employment (R., p. 191).

On this occasion Mr. Gray further testified on cross examination (R., pp. 202–203):

"Q. All of the yellowish material which is disclosed in these pits dug at the instigation of the plaintiff in this case is the material which you brought from up the river, is it not?

A. I wouldn't say so.

Q. Would you say that it was not?

A. I'll say some of it might be; some of it might have come there by some other means.

Q. But it is not lake sand, is it?

A. It is not lake sand, no.

Q. So that all of this material indicated in these pits as yellowish material came from somewheres else than the lake?

A. Yes, that's true.

Q. Now, if you didn't cause all that fill to be made, have you any knowledge of any other fill-in that occurred in that locality?

A. I haven't, except nature and the floods down there, down that creek there, bringing the water in, floods of the Genesee bringing it in, bringing material in.

Q. So that you think the Genesee River, since 1874, has risen to such an extent as to flood this entire area where the pits disclose the yellowish material?

A. Oh, I would not say that.

Q. You would not say that?

A. I would not say that; I would say some of it.

Q. You would say it wasn't so?

A. I would not want to say it wasn't so.

Q. Aren't you sufficiently familiar with this locality to know that since 1874 there has been no such fill-in of a couple of feet of material by the overflowing of the Genesee River?

A. Well, I don't know that, but I imagine it is so.

Q. Now, with reference to the creek, you have told Mr. Abbot, you have told Mr. Ferguson, you have told Colonel Gow, have you not, at times when the three of you were upon the premises inspecting the pits, that the yellowish material in those pits was fill?

A. I said it wasn't sand.

Q. Have you stated that specific thing to them, or have you not?

A. That it was fill?

Q. Yes.

A. Why, I will say now it has been filled.

Q. What?

A. Why, I will say now it has been filled.

Q. All of the yellowish material disclosed in the pits is fill?

A. It must be; it is not lake sand."

Thereafter the plaintiff called Charles R. Gow, Gen. Frederic V. Abbot and John N. Ferguson, all of whom qualified as experts. Each of these witnesses testified that he had examined the test pits in regard to the data disclosed by them. All testified that in their opinion the yellow loamy sand was artificial fill. In connection with their testimony the plaintiff introduced colored diagrams of each pit, showing the levels at which the various materials were found (Ex. 8 to 53, inclusive, Plff.'s atlas), and also photographs of each pit (Ex. 49).

In this connection we call attention to Plaintiff's Exhibit 46 (atlas). This was prepared by Mr. Ferguson (R., p. 278) and was subsequently checked by Mr. Gow (R., pp. 245 to 248) and by Gen. Abbot (R., p. 318). The premises in dispute bound southerly upon Beach Avenue, which runs at approximately right angles to Lake Avenue (the Main Street of the Shepard notes). Certain of the test pits were dug in five lines running from south to north. The figures at the top of the Exhibit 46 represent the distance in feet north or south from O, the north curb of Beach Avenue, which is taken as the reference line. The color yellow represents the thickness of the artificial fill; the top of the black (organic material) or of the gray (lake sand) represents the level of the natural material upon which that fill rests. The lines marked by the black figures 246, 248, 250 represent those elevations above mean ocean level at New York (the datum to which the lake levels are referred by the government). The black figures immediately above the yellow material, connected by dotted lines with the lake sand designate the pit number on Ex. 54 (atlas). The lines A–A, B–B,

etc., correspond to the yellow lines A–A, B–B, etc., upon Ex. 54, which lines are drawn to indicate the lines of pits upon that exhibit. The red lines at the right of each cross section marked, respectively, Shepard line and Finley line, show the position of those lines with reference to the pits. The purpose of the exhibit is to show graphically to the eye the relative level of the top of the natural material and the thickness of the artificial fill resting thereon as we move from the south (right) north toward the lake (left). The significance of the exhibit is the low level of the natural material to the south as we approach (or in the case of Section A–A cross Beach Avenue) as compared with the higher ridge or bar as we move north toward the lake. (Gow, R., p. 249.)

We also call attention to Plff.'s Ex. 54 (atlas). This is a duplicate of Ex. 4 (the Vedder map of the locus made by the Superintendent of Surveys of Rochester) upon which is indicated the position of each test pit by its number. It was prepared by Mr. Ferguson (R., p. 278) and was checked by Gen. Abbot (R., p. 319). The long red line beginning south of lot 21 near the river and extending along Beach Avenue to the middle of Ruggles Street (the old west line of lot 20) is the Shepard line; the other red line is the Finley line, both as plotted by Vedder. The curving blue lines marked 247, 247.5, etc., are contour lines, based upon the data disclosed by the pits, and indicating the contour levels of demarcation between the artificial fill and the natural material on which it rests. The yellow lines A–A, B–B, etc., designate the lines of pits running north and south, which were used as the bases of the cross sections

indicated in Ex. 46. These contours indicated upon Ex. 54, like the cross sections upon Ex. 46, very clearly show the formation of the bar north of the Shepard line and divided from it by a depression in which the black silt or lake sand appears at 247 to 247.5.

The plaintiff then offered evidence of observations by Gen. Abbot of data as to lake levels (Plff.'s Ex. 55, 56, atlas) and of natural conditions upon which he bases a very carefully considered opinion that the ordinary high water mark of Lake Ontario is 248 to 248¼ (R., pp. 320–329). In the course of this testimony, after referring to and considering certain observations of natural conditions upon or near the locus, Gen. Abbot pointed out that recorded data disclosed that the lake in the period from 1837 to 1922, inclusive, had remained at a mean level of 248 during 60 months — or five years — and at a mean level of 247.95 during a period of 68 months (R., pp. 327–328). It is not without significance that Judge Sutherland in the course of Gen. Abbot's examination expressed his admiration of Gen. Abbot's "accuracy of statement and evident spirit of fairness" (R., p. 319). After recalling Mr. Ferguson to add some incidental testimony, the plaintiff rested. (R., p. 345.)

The defendants thereupon recalled William C. Gray (R., p. 346). Mr. Gray, on this occasion, testified upon direct by Judge Sutherland, in part, that in 1874, when he was preparing to lay the single track for the New York Central Railroad, the land from 150 feet south of the present south line of Beach Avenue north to Lake Ontario was "all dry sand with the exception

of a narrow strip where the ditch or stream from Lake Avenue ran eastward into the river" (R., p. 346); that this ditch was between 15 and 20 feet wide on top, and possibly four feet wide at the bottom (R., p. 346); that the character of the banks north and south of this waterway or ditch was sand (R., pp. 346–7); that the color of the sand between the point 150 feet south of Beach Avenue and the edge of Lake Ontario was gray (R., p. 347); *that in 1874 before he began his preparations to lay the single track there was absolutely no fill on it* (R., p. 347); that the single track remained until 1884 (R., p. 357); that he as a surveyor was connected with laying the new balloon track (R., p. 360); that the character of the soil was sand (R., p. 361); *that there was nothing on the sand before he began to lay the balloon track, nothing but sand lake sand* (R., p. 361); that he assumed an elevation which would be the height of the water in the lake at that time, which was 247½ (R., p. 361); that he excavated through the sand into the water to a point six inches below that height and set foundation ties for the track (R., p. 362); that the balloon track ran to a point 75 feet from Lake Ontario (R., p. 362); *that in the excavation he put a foot of sand which he got up the railroad south of Charlotte* (R., p. 363); that it differed in color and texture from lake sand, *there was loam in it and in lake sand there is no loam* (R., p. 363); that the railroad put two strings of tile (pipe) three feet in diameter in McIntyre's ditch running from west of Lake Avenue through to the River (R., p. 364); that the tiling extended about ninety feet west of Lake Avenue, and about 390 feet south of the south line of Beach Avenue (R., p. 364); that there were

two tile drainage pipes each three feet in diameter, running side by side where the old McIntyre ditch had run (R., p. 364); that the *bottom* of the tile (pipes) was along about elevation 243 he should think (R., p. 365); that the bottom of the tile was about a foot below the bottom of the McIntyre ditch before the tile was laid (R., p. 365); that he saw foreign material laid in up to the south line of *present* Beach Avenue (R., p. 369); that this was done by the Railroad Company in 1884 (R., p. 369); *that this foreign material came from up the Charlotte Road above Marshall Street* (R., p. 369); *that the nature of it was dark sand loam* (R., p. 369); that starting at nothing on the south line of *old* Beach Avenue (which ran north of *present* Beach Avenue) he leveled the fill up to a foot at the south line of New Beach Avenue, which would be 248.5 to correspond to the top of the track, the top of the rail being 248.9 (R., p. 369).

Upon direct examination by Mr. Moser (representing the Bartholomay Company) Mr. Gray further testified:

That in the following year, 1885, he went to work and really developed the Bartholomay property on the north of Beach Avenue and west of Lake Avenue (R., p. 375); that he conducted the engineering development of this property (R., p. 375); that at the time when he took charge of the development of that property in 1885 the character of the soil was sandy soil so far as he knew (R., p. 375); that when he says sandy soil he means *lake sand* (R., p. 375):

"Q. Was there any evidence of any foreign sand having been put there at that time?

A. No." (R., p. 375.)

The Commonwealth calls attention to this further testimony of Mr. Gray for several reasons. In the first place, the parts put in italics indicate that his testimony at R., p. 202 (quoted *supra*) to the effect that he would not say that the yellowish material in the pits was material which was brought from up river, and that floods of the creek and Genesee might have brought some of it in, was, at the very least, an attempt to suppress the truth and suggest a falsity which was nipped in the bud only because he was faced with a prior admission to Mr. Abbot, Col. Gow and Mr. Ferguson (R., p. 203).

In the second place, the testimony given upon this second appearance with respect to the dry and sandy nature of the premises is not to be reconciled with his prior testimony as to the seeping in of water from the lake and the presence of water before he drained it, and the placing of ties in water (R., pp. 189–190).

In the third place, Mr. Gray's testimony to Mr. Moser, at p. 375, effectively disposes of the testimony of Theodore Knowlton (R., p. 473 *et seq.*), who was subsequently called by the Bartholomay Company as an expert to testify that in his opinion much of the yellow material upon that property was naturally deposited by the creek, although he testified that the yellow sand upon the railroad parcel, east of Lake Avenue, was artificially deposited (R., p. 480), and that he did not know where the mouth of the creek was (R., p. 510). It is plain to demonstration that if there was none of this yellow material on the Bartholomay property in 1885, as Mr. Gray testifies from *personal* observation (R., p. 375), and if, in 1884, the creek had been put in two 3 foot tile pipes which

extended 390 feet south of the Bartholomay property, as also Mr. Gray testifies (R., p. 364), the yellow material could not have been deposited on the Bartholomay parcel by the creek, as Mr. Knowlton testifies.

The Commonwealth respectfully suggests that the testimony of Mr. Gray and the testimony of Mr. Knowlton "give to think", as the French say. Also that in view of Mr. Gray's apparent willingness "to put the facts in a better light which somewhat alters the sense", any admissions which are drawn from him upon cross examination must carry conviction. We turn to that cross examination (R., p. 376).

Upon this second appearance Mr. Gray testified upon cross examination, in part, as follows (R., p. 383):

"Q. You have read over your testimony of the last hearing since that hearing, have you not?

A. No.

Q. Have you had it read over to you?

A. No sir.

Q. Is your testimony of today to be taken as entirely consistent and be interpreted with the testimony which you gave on the other hearing?

A. The testimony that I gave today is exactly what I wanted to testify to the other day.

Q. Do you regard your testimony of today as to be taken subject to and with reference to your testimony of the other day?

A. No.

Q. In other words, you want your testimony of today to supercede your testimony of the other day?

A. Yes.

Q. And you have made your testimony of the other day the subject of some consideration with counsel?

A. Very little.

Q. You have, haven't you?

A. No. A little, I have a very little.

Q. Then you do regard your testimony today as being inconsistent with your testimony the other day?

A. I don't know. My testimony the other day was distorted testimony, and was distorted in many places by your making me say yes and no, when I didn't want to. But today I have tried to give the exact status of the affair as it happened in 1873, 1874 and 1884."

He further testified that the top of the ties of the balloon track was at level 248.5 (R., pp. 384, 385, 387, 388, 389, 390); that in crossing the tile drain a six inch tie was boxed down two inches on a twelve inch timber (R., p. 389); that below the timber was six inches of fill on top of the tile (R., p. 389); that top of the 3 foot tile was a few inches higher than the top of the south bank (R., p. 387); that the north bank of the ditch was about six inches higher than the south bank (R., p. 388);

"Q. Your best recollection now is that the bottom of the rail was 248.5 and that below that would be four inches of tie, twelve inches of timber and six inches of fill, and six inches of tile before you got down to the top of the south bank of the McIntyre ditch, am I right?

A. No, because you said six inches of fill and six inches of tile and you don't mean that.

Q. How far above the top of the south bank of the ditch did the tile project?

A. I told you less than six inches.

Q. You can say about six inches?

A. I would say about six inches.

Q. Then my original question was correct, wasn't it?

A. Yes.

Q. Now do you clearly understand it?

A. Yes, I do.

Q. So that you had twenty-eight inches of distance between the bottom of the rail at 248.5 and the top of the south bank of the McIntyre ditch?

A. Twenty-two inches.

Q. Figure it up yourself and tell me if that is what you mean?

A. Yes, twenty-two inches.

Q. Have you figured the tile projecting above the top of the ditch?

A. You are right there, twenty-eight inches to the top of the bank.

Q. So that the top of the south bank of the McIntyre ditch was twenty-eight inches below 248.5?

A. Yes.

Q. So that the top of the south bank of the McIntyre ditch was 246.1 above sea level, wasn't it?

A. It was higher than that.

The Master: How much higher?

A. It was at least 247.5, for the reason that I had no water there when I put that track in. It must have been at least 247.5.

The Master: So there is some discrepancy in your calculation of at least a foot?

A. Yes.

The Master: And you do not know where that discrepancy is?

A. No."

He further testified (R., p. 391) as he had on direct (R., p. 365) that the bottom of the 3 foot tile was at level 243.

He further testified that the top of the sub-base of his track was at 247.5 (R., pp. 380, 385); that he put a foot of fill on that (R., p. 385); that wherever he laid his track he had below the bottom of his rail at least a foot of ballast as distinguished from sand or any other material (R., p. 393); that he took sand from the north, laying it over the area as it then was and then put a foot of ballast on top that would take care of the track (R., p. 393):

"Q. Now how much sand did you excavate from the north in this ridge, how large a quantity?

A. It was up as high as three feet.

Q. And you dumped that in this area south?

A. Yes.

Q. How much in depth was the sand which you dumped in there on the lower area south, for the purpose of building the balloon track?

A. Not a terrible lot.

Q. About how deep was it?

A. Well, six inches, perhaps.

Q. And perhaps a little more in some places?

A. Maybe, in some places.

Q. I think you said the other day that there were some places where it was over a foot, were there not?

A. There might have been because there were depressions.

Q. In those places where there was a foot of sand dumped in the area where it was dumped was only about 246.5 above sea level, was it?

A. About that.

Q. So that in some of these pits where we find lake sand with loam on top, we may be finding lake sand which has been dumped in there by you?

A. It might be.

Q. So that the original elevation of the area disclosed by the pit may be lower than the lake sand appearing in the pit because of your having filled that lake sand into the area?

A. Yes, but I don't find any diagram here where a pit appeared where we had a track.

Q. Now, did you use all of the lake sand in this three foot excavation only along the line of track?

A. No, we dumped some in the south end there, wherever there was a depression that needed filling.

Q. So that you had filled in lake sand at other places than along the balloon track?

A. Yes."

The importance of this testimony of Mr. Gray lies in the fact that it is the testimony of the engineer who made the fill for defendants and who was strongly biased in favor of the defendants. He fixes the character of the premises north of the Shepard line as a sand beach in which was a depression at the south, and which then sloped *upward* to the bar, and then down to the lake. This is precisely the situation disclosed by the test pits. He further fixes the natural level of this depression as 246 to 246.5 by *three* different tests, and draws the line of this low level along the south bank of the ditch all across the Railroad parcel and at least 90 feet into the Bartholomay parcel. In the first place the south bank of the ditch was 28 inches below the base of his rail which was at 248.5 — which fixes the whole south bank of the ditch as 246.1. In the second place the bottom of the 3 foot tile was at 243, which fixes the top of the north bank of the ditch at 246. In the third place if the bottom of the rail was at 248.5, and below that there was one foot

of ballast and one foot of fill, the natural level of the premises was about 246.5. This is about six inches to a foot lower than the level at which the Southern test pits show apparently natural sand. The reason is that Gray took *lake* sand from the ridge to the north, and dumped it in the low place to the south — a condition which the test pits would not disclose.

The defendant's allegations of accretion are thus disposed of both in law and in fact. In the first place defendants do not bound upon the water and so in law are not entitled to accretions.

Banks *v.* Ogden, 2 Wall. 57, 67, 69.

The accretions due to the gradual advance of the water line northward belong to the Commonwealth as owner of both beach and bed. (Banks *v.* Ogden, *supra.*) In the second place the defendants have failed to prove as a fact any natural addition *to their property.* Nature deposited nothing *at the Shepard line.* No natural deposits *begin at that point* and extend continuously northward from that line. The testimony of defendants' own engineer establishes a low level of 246 to 246.5 at a point which closely corresponds to the Maurice water line of 1829. This depression extended along the line of the old creek across the Railroad parcel from east to west, and far into the Bartholomay parcel. The accretions which slope upward to form the bar farther north, begin at this point, which was approximately the lake margin of *plaintiff's* beach as shown by Maurice in 1829. (See composite map, Plff.'s Ex. 61, atlas). This bar was of course the property of the Commonwealth because formed at a

distance from defendants' land upon the bed or beach belonging to the Commonwealth.

St. Louis *v.* Rutz, 138 U. S. 226, 247.
Winford *v.* Griffin, 1 Fed. 2d 224, 225.

That bar, formed upon *plaintiff's* property, cannot justify the defendants in filling in the intervening depression, and covering over the bar, in order to annex physically to lots 20 and 21, property which lay north of the Shepard line. Irrespective of any question of notice, artificial fill confers no rights.

Blakeslee *v.* Commissioners, 135 N. Y. 447, 450.
Saunders *v.* N. Y. C. & H. R. R.R. Co., 144 N. Y. 75, 84.
Sage *v.* Mayor of New York, 154 N. Y. 61, 83.
Archibald *v.* N. Y. C. & H. R. R.R. Co., 157 N. Y. 574, 580.
Hinkley *v.* New York, 234 N. Y. 309, 318.
Revell *v.* People, 177 Ill. 468.
Cobb *v.* Commissioners, 202 Ill. 427.
Illinois Central R.R. *v.* Chicago, 176 U. S. 646.
Park Commissioners *v.* Taylor, 133 Ia. 453, 461.
State *v.* Korrer, 127 Minn. 60.
Kirk *v.* Dempsey, 85 N. J. L. 304.
Wainwright *v.* McCullagh, 63 Pa. St. 66.
Menominee River L. Co. *v.* Seidl, 149 Wis. 316, 320.

II. Through the Record Massachusetts gave Notice to Defendants that it had Title to the Locus, and that no Adverse Possession of the Locus for Any Length of Time could be Adjudged a Disseizin of the Commonwealth.

A. The Extent of the Notice given by the Record.

As matter of law the defendants were charged with notice of every fact as to the title of the Commonwealth which was on record at the time when they seized the locus.

Johnson *v.* Stagg, 2 Johns. 515, 525 (1807).
Frost *v.* Beakman, 1 Johns. Ch. 288, 293.
Parkist *v.* Alexander, 1 Johns. Ch. 394, 398.
Dick *v.* Balch, 8 Pet. 30, 38.
New York R. S. pt. 2, c. 1, § 3.

It is immaterial whether defendants examined the record or not; they are charged with notice of every fact which such examination would have disclosed.

Dick *v.* Balch, 8 Pet. 30, 38.
Brush *v.* Ware, 15 Pet. 93, 110–112.

Indeed, they were charged with notice, not only of every fact which was actually recorded, but also of every fact to which reasonable investigation of the recorded facts would have led them, including the rules of law applicable thereto.

Brush *v.* Ware, 15 Pet. 93, 110–112.
Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 437.

Northwestern Bank *v.* Freeman, 171 U. S. 620, 628.
Ochoa *v.* Hernandez, 230 U. S. 139, 164.

In Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 437, the court said, by Fuller, C.J.:

"The rule is thus stated by the Virginia Court of Appeals, in Burwell's Adm'rs *v.* Fauber, 21 Gratt. 446, 463: 'Purchasers are bound to use a due degree of caution in making their purchases, or they will not be entitled to protection. *Caveat emptor* is one of the best settled maxims of the law, and applies exclusively to a purchaser. He must take care, and make due inquiries, or he may not be a *bona fide* purchaser. He is bound not only by *actual* but also by *constructive* notice, which is the same in its effect as actual notice. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a *bona fide* purchaser.'"

In Northwestern Bank *v.* Freeman, 171 U. S. 620, 628, McKenna, J., said:

"A purchaser is charged with notice of every fact shown by the records, and is presumed to know every other fact which an examination suggested by the record would have disclosed."

In Ochoa *v.* Hernandez, 230 U. S. 139, in holding that a purchaser took with constructive notice that a certain *retroactive* regulation cutting the period of limitations from twenty years to six years was unconstitutional, the court said, by Pitney, J. (p. 164):

"It is a familiar doctrine, universally recognized where laws are in force for the registry or recording of instruments of

conveyance, that every purchaser takes his title subject to any defects and infirmities that may be ascertained by reference to his chain of title as spread forth upon the public records. Brush *v.* Ware, 15 Pet. 93, 111; Simmons Creek Coal Co. *v.* Doran, 142 U. S. 417, 437; Northwestern Bank *v.* Freeman, 171 U. S. 620, 629; Mitchell *v.* D'Olier, 68 N. J. Law (39 Vr.), 375, 384; 53 Atl. Rep. 467; 59 L. R. A. 949.

. . . In other words, if the registry gives notice of a state of facts that renders the title invalid or subject to question in law, the purchaser who relies upon the record takes his title subject to whatever consequences may flow in law from the facts thus notified."

To the same effect, see

Livingston *v.* Nealley, 10 Johns. 174.
Howard Ins. Co. *v.* Halsey, 8 N. Y. 271.
Mitchell *v.* D'Olier, 68 N. J. L. 375.

And if the facts recorded in the appropriate registries in New York were such that reasonable diligence required the defendants to come to Boston to inquire of the Commonwealth, the distance between Boston and Rochester would not excuse a failure so to do.

Brush *v.* Ware, 15 Pet. 93, 111–112.

B. What Facts the Record Disclosed to Those Defendants who Claim Title to Any Part of the Locus.

All the defendants who claim any part of the locus had notice from the record of the following matters:

1. The Hartford Treaty, which by Article II gave notice of the title of the Commonwealth to the locus, and by Article VII gave notice that no adverse possession thereof for any length of time should be ad-

judged a disseizin of the Commonwealth. (R., p. 739, par. 1.) Irrespective of any notice or record, all the defendants, including New York, were bound by all the provisions of the Hartford Treaty.

Poole *v.* Fleeger, 11 Pet. 185, 209.
Rhode Island *v.* Massachusetts, 12 Pet. 657, 725, 727.

2. St. 1788, c. 23 (R., p. 739, par. 3), which bounded the tract thereby granted to Gorham and Phelps by a western line which was defined by or in reference to the Genesee River and ran northwardly "to the shore of the Ontario Lake," from which terminal monument the north line ran "eastwardly along the shores of said Lake."

3. The partition deed of October 4, 1804 (R., p. 740, par. 6), which conveyed town lots 20 and 21 in severalty to Sir William Pulteney "according to a survey and map made by William Shepard hereto annexed and to which reference is herein had."

4. The Shepard survey (R., p. 740, par. 5), which is referred to in the partition deed of 1804, and by which Shepard bounded both lot 20 and lot 21 by side lines which ran "to the beach" to boundary posts for which cross bearings are given, thereby marking those posts as termini. Through those terminal monuments the north line is drawn "along the shore." That survey has been the basis of conveyance ever since.

5. That from 1804 to 1863 there was no recorded conveyance of either lot; both lots passed by will or descent until they vested in the Earl of Craven, Oswald and Estcourt (R., p. 741, par. 8).

On July 21, 1863, the Earl of Craven, Oswald and Estcourt conveyed town lot 20 to Wilder and Whitney by warranty deed (R., p. 742, par. 13), "together with all the right, title and interest of the first parties in and to all the land lying north of lot 20 to Lake Ontario."

From this time on lot 20 and lot 21 are owned by different owners. By subsequent conveyances, which it is not necessary to enumerate, all the right, title and interest of Whitney in the land north of lot 20 passed to the Bartholomay Co., the New York Central Railroad, the Bosharts and the McIntyres. (R., p. 743, par. 16.) Those defendants, therefore, not only had the notice of the title of the Commonwealth to all the land north of the north line of lot 20 as surveyed by Shepard, which was given by the Treaty, St. 1788, c. 23, and the partition deed of 1804, but they had also the further warning given by the Earl of Craven, Oswald and Estcourt in this deed to Whitney. Those grantors convey lot 20 to Whitney *with warranty;* they *quitclaim* the land north of lot 20. Three quarters of a century after the grant to Gorham and Phelps by St. 1788, c. 23, and over half a century after Shepard traced upon the soil their construction of that grant, the Earl of Craven and his co-grantors say in effect to Whitney and all who claim through him:

"We will *warrant* our title to lot 20 as surveyed by William Shepard and by him bounded *upon the beach* in 1803; you must take your chance as to the land between that line and Lake Ontario."

On August 27, 1868, by warranty deed, the Earl of Craven, Oswald and Estcourt conveyed lot 21 to Martin McIntyre, describing it as —

"Building lot No. 21, adjoining the Genesee River and Lake Ontario . . . containing four (4) acres, be the same more or less." (R., p. 741, par. 9.)

On October 12, 1872, McIntyre conveyed to Byrne and wife by the same description, and Byrne and wife thereafter conveyed by the same description to Patrick Manrow. (R., p. 742, par. 11.) On May 31, 1881, Patrick Manrow and wife conveyed a part of lot 21 to the New York Central by a description of which the material part is as follows (R., p. 742, par. 12):

"All that piece or parcel of land situate in the Village of Charlotte, County of Monroe and State of New York, known and described as village lot No. 21, bounded as follows: On the east by the Genesee River, on the north by Lake Ontario, on the west by a street known as Broadway,* and on the south by lot No. 22" (with an exception not material).

The conveyance by the Shepard lot number, and the call for the Shepard quantity, in the deeds to McIntyre, Byrne and Manrow incorporate the calls of the Shepard survey into the description. The words "adjoining the Genesee River and Lake Ontario" are words of location, not words of boundary, for except by reference to the Shepard survey no western and southern boundaries are given. The change of description in the deed from Manrow to the New York Central Railroad indicates a doubt whether the three earlier deeds even purport to bound upon the lake, and also a desire on the part of the Railroad to have at least a paper title to the land north of the Shepard line,

* The Main Street of the Shepard Notes, now called Lake Avenue.

before it made the fill which gave to the locus the appearance of upland.

Although charged with notice of all these facts, as matter of law, the New York Central Railroad, in 1884, and the Bartholomay Company, in 1885, filled in the locus and thereby gave to it the appearance of upland. Through their agent Gray, who devised the plan for the fill on their behalf, they knew the physical condition of the premises.

The Distilled Spirits, 11 Wall. 356.

They therefore knew that the accretions which nature had made were accretions to the beach (title to which was in the Commonwealth), and that nature had in fact added nothing either to lot 20 or to lot 21. In law their acts constituted an appropriation of property to which they had no title, *with notice of the title of the Commonwealth*, coupled with a concealment of that wrong by the artificial fill.

Point Five.

THE DEFENDANTS HAVE NOT ESTABLISHED THEIR CLAIM OF ESTOPPEL.

I. The Claim of Estoppel.

Several of the answers allege in substance that the Commonwealth gave no notice of its title to the locus, but that with knowledge that defendants and their predecessors were in open and visible possession of the locus under claim of title, the Commonwealth stood by in silence and permitted the defendants to improve it at great expense.

II. The Record Disposes of the Claim that Massachusetts gave Defendants no Notice of its Title.

Massachusetts gave notice of its title. It is admitted that the Hartford Treaty was put on record with the Secretary of State in New York on February 2, 1787 (Rec., p. 739, par. 1). It was later recorded in the several counties, including Ontario County (Rec., pp. 612–615), from which county Monroe County, in which the locus now is, was later set off (Rec., p. 745, par. 20). It is also admitted and proved that Res. 1787, c. 135, (the agreement to convey to Gorham and Phelps) and St. 1788, c. 23, (the actual instrument of conveyance) were combined in one instrument which was exemplified under the great seal of the Commonwealth and was duly recorded both with the Secretary of State of New York on February 6, 1789, and in Ontario County (Rec., p. 739, par. 3; Plff.'s Ex. 3, Rec., pp. 598, 601). The record of these two instruments gave notice to defendants (1) of the title of Massachusetts to the tract conveyed by Article II of the Hartford Treaty, (2) of the several provisions of that treaty, including the guarantee against disseisin made by Article VII, (3) of the extent of the premises retained by Massachusetts after the conveyance to Gorham and Phelps by St. 1788. The registry is provided by law for that very purpose. The defendants who claim through and under both instruments were charged with notice of them whether they examined that record or not. In a word Massachusetts took the most effective means known to the law to give notice, first of what she received under the treaty, second of what she conveyed, third of what she retained.

III. The Record in New York was not Notice to Massachusetts of Any Conveyance Subsequent to the Treaty.

The record is notice to each grantee of all facts which are recorded in his chain of title up to the moment of the conveyance to him. It is not notice to him or to his grantors of any conveyance recorded subsequently.

Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 274.
Moyer *v.* Hinman, 13 N. Y. 180, 187.
Trustees of Union College *v.* Wheeler, 61 N. Y. 88, 109, 119.
Ackerman *v.* Hunsicker, 85 N. Y. 43, 49.
Tarbell *v.* West, 86 N. Y. 280, 288.
Bates *v.* Norcross, 14 Pick. 224, 231.
George *v.* Wood, 9 Allen, 80, 83.
Robinson *v.* Bird, 158 Mass. 357, 360–1.
Hardy *v.* Beverly Sav. Bank, 175 Mass. 112.
Dixon *v.* Smith, 181 Mass. 218, 221.
Townsend *v.* Vanderwercker, 160 U. S. 171, 186.
McLean *v.* Lafayette Bank, 4 McLean, 430, 433.

Of course Massachusetts had notice of her grant to Gorham and Phelps because she was a party to it. That notice flows from her own acts in connection with it, not from the subsequent record thereof in New York. The record was not notice to Massachusetts of any conveyances by Gorham and Phelps or those claiming under them.

IV. There is no Evidence that Massachusetts Learned of the Acts of Defendants Prior to June 24, 1920.

Between June 24 and June 28, 1920, the then Attorney General of Massachusetts received from the deputy corporation counsel of Rochester, Albert D. Shepard, a letter dated June 24, 1920 (Plff.'s Ex. 57, Rec., p. 602) which called attention to the physical condition of the locus and the acts of certain defendants in regard to it. So far as appears this was the first intimation as to the physical facts. Careful search disclosed no earlier information (Benton, Rec., pp. 559–563). The defendants have not introduced a scintilla of testimony that prior to this time Massachusetts had either learned of the formation of the locus or of defendants' appropriation of it.

The proof therefore shows that the defendants seized the locus, and gave to it the appearance of upland by artificial fill, with notice of plaintiff's title from the record, while the Commonwealth was wholly ignorant of their acts. This disposes of the alleged estoppel.

Brant *v.* Virginia Coal & Iron Co., 93 U. S. 326, 337.
Crary *v.* Dye, 208 U. S. 515, 521.
Oklahoma *v.* Texas, 268 U. S. 252, 257.

In Oklahoma *v.* Texas, *supra*, Van Devanter, J., said (p. 257):

"Only where conduct or statements are calculated to mislead a party and are acted upon by him to his prejudice can he invoke them as the basis of such an estoppel. And if they relate to the title of real property, 'where the condition of the title is known to both parties or both have the same means of knowledge there can be no estoppel.'"

Point Six.

THE DEFENDANTS MAKE OUT NO DEFENCE UNDER THE MASSACHUSETTS STATUTE OF LIMITATIONS.

I. The Statute.

Mass. R. S., c. 119, § 12, provides:

"No suit for the recovery of any lands shall be commenced by or in behalf of the Commonwealth, unless within twenty years after the right or title of the Commonwealth thereto first accrued, or within twenty years after the Commonwealth, or those from or through whom they claim, shall have been seized or possessed of the premises."

Section 12 was first passed on November 4, 1835, as a part of the Revised Statutes, which was the first codification and consolidation of the laws. It is not a codification of any statute previously in force. By St. 1867, c. 275, the following amendment was made:

"SECTION 1. The provisions of section twelve of chapter one hundred and fifty-four of the General Statutes, shall not apply to any property, right, title or interest of the Commonwealth below high-water mark or in the great ponds.

SECTION 2. This act shall take effect upon its passage.

Approved May 27, 1867."

II. The Statute is Inapplicable.

No state can exercise authority over persons and property beyond its borders.

Bank of the United States *v.* Donnelly, 8 Pet. 361, 362.

Pennoyer *v.* Neff, 95 U. S. 714, 722.

It is settled that statutes of limitation go to the remedy.

Bank of the United States *v.* Donnelly, 8 Pet. 361.

McElmoyle *v.* Cohen, 13 Pet. 312, 327.
Townsend *v.* Jemison, 9 How. 407, 413.
Walsh *v.* Mayer, 111 U. S. 31.
Union P. Ry. Co. *v.* Wyler, 158 U. S. 285, 289.
Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 339.
Clarke, *v.* Pierce, 215 Mass. 552, 553.
LeRoy *v.* Crowninshield, 2 Mason, 151.

Manifestly, the Legislature of Massachusetts cannot prescribe for this court what remedy it shall afford in a suit for recovery of New York lands. Only the Legislature of New York can prescribe what length of possession shall bar suit for the recovery of lands in that state. Hence the act is as matter of law inapplicable.

III. Even if the Statute were Applicable, the Defendants do not Bring Themselves within its Terms.

Even if the statute had been applicable either in point of power or in point of construction, the defendants do not bring themselves within it. The statute requires twenty years of continuous, open, notorious, exclusive and adverse possession to bar the remedy even in the courts of Massachusetts.

Belotti *v.* Bickhardt, 228 N. Y. 296, 302.
Hinkley *v.* New York, 234 N. Y. 309, 316.
Cook *v.* Babcock, 11 Cush. 206, 209.
Barr *v.* Gratz, 4 Wheat. 213.
Pillow *v.* Roberts, 13 How. 472, 477.

Possession of lands is always presumed to be in subordination to the true title.

Doherty *v.* Mitchell, 119 N. Y. 646, 647.
Heller *v.* Cohen, 154 N. Y. 299, 311.

Lewis *v.* New York, etc., R.R. Co., 162 N. Y. 202, 220.
Hinkley *v.* New York, 234 N. Y. 309, 316.

The burden of proving every essential element of adverse possession for the statutory period is on him who asserts it.

Heller *v.* Cohen, 154 N. Y. 299, 311.
Lewis *v.* New York etc. R.R. Co., 162 N. Y. 202, 220.
Hinkley *v.* New York, 234 N. Y. 309, 316.
Coburn *v.* Hollis, 3 Met. 125, 128.
Cook *v.* Babcock, 11 Cush. 206, 209.
McDonough *v.* Everett, 237 Mass. 378, 384.

The R. S., c. 119, § 12, as we have seen, was so amended by St. 1867, c. 275, as to exclude both great ponds and lands below high water mark. This act took effect on May 27, 1867. After that date no adverse possession previously acquired could so ripen as to bar the remedy or confer title.

Sklaroff *v.* Commonwealth, 236 Mass. 87.
Bradford *v.* Metcalf, 185 Mass. 205, 209.
Weber *v.* Harbor Commissioners, 18 Wall. 57, 71.

The burden is, therefore, upon the defendants to prove an adverse possession beginning on or before May 27, 1847, which was continuously maintained and ripened into title before St. 1867, c. 275, took effect on May 27, 1867.

There is not a scintilla of evidence to prove such adverse possession. The earliest human testimony goes back only to 1851, the year when Mr. Petten

came to Charlotte. (R., p. 158.) Even if he had given sufficient testimony to establish adverse possession, on the part of either McIntyre or Nelson (see R., p. 161), he could not carry that testimony back of the year when he came. This leaves four years wholly unaccounted for, even if we assume, without conceding, and wholly without evidence, that McIntyre's and Nelson's possession was open, continuous, exclusive and adverse, instead of in subordination to the true title, as the law presumes.

Moreover, there is cogent evidence to the contrary. The Pettes map (Plff.'s Ex. 62) as applied to Gen. Abbot's composite map (Plff.'s Ex. 61) shows that the 1844 water line was inside the bar on which McIntyre later had his shack. In other words, the bar had not formed in 1844. There is no evidence that the bar was in such a state that a shack *could* be built upon it, much less that it *was* built upon in 1847. Aside from Mr. Petten's inability to go back of 1851, nonexistence of the bar in 1844 strongly rebuts any claim of adverse possession during the only period when, if the statute were applicable, it could avail the defendants, namely, prior to 1867.

The defendants argued below that this act was an "assurance" that the Commonwealth would not sue if it had been disseized twenty years. But how is that any comfort to defendants? So far as they were concerned, the assurance had ceased to exist in 1867, before either had seized upon the locus. There is not a scintilla of evidence that they ever heard of the statute or acted in reliance upon it. If they felt then and feel now that such assurance was needed to reassure them, they admit knowledge that their case was and is perilously weak.

Point Seven.

AS MATTER OF LAW THE DEFENDANTS DO NOT ESTABLISH ANY DEFENCE TO THIS BILL EITHER UNDER THE STATUTE OF LIMITATIONS OR BY LACHES.

Even if the defendants had pleaded the New York statute of limitations, it could not have availed them. The ordinary statute of limitations does not apply to a state.

Lindsey *v.* Miller, 6 Pet. 666, 673.
Gibson *v.* Chouteau, 13 Wall. 92, 97.
Weber *v.* Harbor Commissioners, 18 Wall. 57, 70.
Redfield *v.* Parks, 132 U. S. 239, 244.
People *v.* Gilbert, 18 Johns. 227, 228.
Driggs *v.* Phillips, 103 N. Y. 77.
Sutter *v.* Hickman, 1 Alaska, 81, 90.
Keola *v.* Parker, 21 Hawaii, 597.
Terra Haute, etc. R.R. Co. *v.* State, 159 Ind. 438, 478.
Sklaroff *v.* Commonwealth, 236 Mass. 87.

Thus, in Lindsey *v.* Miller, 6 Pet. 666, in holding that over forty years' adverse possession would not give title against the state, the court said, by McLean, J. (p. 673):

"That the possession of the defendants does not bar recovery is a point too clear to admit of much controversy. It is a well-settled principle, that the statute of limitations does not run against a State."

So, in Gibson *v.* Chouteau, 13 Wall. 92, in holding that a state statute of limitations could not defeat

either the title of the United States or its grant, the court said, by Field, J. (p. 99):

"It is a matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. *The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public.* People *v.* Gilbert, 18 Johns. 228. (Italics ours.)

Again, in Weber *v.* Harbor Commissioners, 18 Wall. 57, in holding that the statute of limitations could not bar the title of the State of California to certain shore lands, the court said, by Field, J. (p. 70):

"The presumption to which the statute gives this effect extends, however, only against individual claimants; their personal interest is supposed to be sufficient to induce vigilance in the enforcement of their claims. It does not extend against the State, which acts through numerous agents, having no such incentive to prosecute her claims. The rule, therefore, with respect to her rights is that they are not lost or impaired by the negligence of her officers, a rule which has been found by experience essential to the preservation of the interests and property of the public. Statutes of limitation are not for this reason held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied."

And in Redfield *v.* Parks, 132 U. S. 239, the court said, by Miller, J. (p. 244):

"It is a well-settled principle that the statute of limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. *Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result.* (Italics ours.)

Moreover, the Seventh Article of the Treaty provides:

"That no adverse possession for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts."

A statute of limitations applicable to the Commonwealth would impair the obligation of this article within the meaning of U. S. Cons., art. I, § 10.

Green *v.* Biddle, 8 Wheat. 1.

As the statute of limitations would be no bar at law, the doctrine of laches does not apply to a bill in equity brought by a state for its own benefit.

United States *v.* Kirkpatrick, 9 Wheat. 720, 735.
Sparks *v.* Pierce, 115 U. S. 408, 413.
United States *v.* Nashville, etc., Ry. Co., 118 U. S. 120, 125.
United States *v.* Beebe, 127 U. S. 338, 344.
San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 135.
United States *v.* Beebe, 180 U. S. 343, 354.

Utah Light & Power Co. *v.* United States, 243 U. S. 389, 409.
United States *v.* New Orleans P. Ry. Co., 248 U. S. 507, 518.
Jackson County *v.* Derrick, 117 Ala. 348, 365.
Keola *v.* Parker, 21 Hawaii, 597, 601.
Estate of Ramsay *v.* People, 197 Ill. 572, 592.
Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 478–9.
Westwood *v.* Dedham, etc., St. Ry. Co., 209 Mass. 213, 217.
Stoughton *v.* Baker, 4 Mass. 521.
Seymour *v.* Van Slyck, 8 Wend. 403, 422.
Mt. Vernon, *v.* N. Y. C. & H. R. R.R. Co., 232 N. Y. 309.
Norfolk & Western R. Co. *v.* Supervisors, 110 Va. 95, 103.
See also Hinkley *v.* New York, 234 N. Y. 309.

Thus, in United States *v.* Kirkpatrick, 9 Wheat. 720, 735, the court said, by Story, J.:

"The general principle is that laches is not imputable to the government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various and its agencies so numerous and scattered that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions."

In United States *v.* Nashville, etc., Ry. Co., 118 U. S. 120, the United States brought suit upon certain bearer bonds and coupons of the defendant

road, which it purchased, before the statute of limitations had run, with certain funds held in trust for the Chicasaw Indians. The trust having been discharged, the United States sues *in order to realize upon the bonds and coupons for its own benefit.* It will be noted that the bonds and coupons were *not* property actually devoted to a governmental use except in so far as turning them into money would provide funds for the needs of the government. In holding that the court below wrongly directed a verdict for the defendant, upon the ground that the statute of limitations had run before the suit was brought, the court said, by Gray, J. (p. 125):

"It is settled beyond doubt or controversy — *upon the foundation of the great principle of public policy, applicable to all governments alike,* which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided — that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

In United States *v.* Beebe, 127 U. S. 338, in holding that a bill in equity brought *in the name of the United States* in order to annul a land patent, *for the benefit of private parties,* would be barred by the laches of the persons for whose benefit the bill was brought, the court said, by Lamar, J. (p. 344):

"The principle that the United States are not bound by any statute of limitations, *nor barred by any laches of their officers, however gross,* in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt. United

States *v.* Nashville &c. Railway Company, 118 U. S. 120, 125."

In Norfolk & Western R. Co. *v.* Supervisors, 110 Va. 95, 103, the court dismissed the defence of laches with the curt observation:

"As against the government laches cannot be set up in equity any more than the bar of the statute can at law."

Even if a bill brought by the state on behalf of private citizens, or by citizens in the name of the State as a nominal though not the real complainant, may be barred by the laches of the beneficial complainants (see United States *v.* Beebe, 127 U. S. 338, supra), that principle does not apply to the case at bar. The Commonwealth brings the bill upon its own behalf to enforce property rights granted and guaranteed to it in its governmental capacity by a Treaty with a sister state. The case is not within the exception applicable to suits which in name appear to be brought by the state, but which are in fact brought for the benefit of private citizens.

The seventh article of the Treaty is so drawn as to apply to all suits, whether in law or in equity. The chancellor can no more decree that adverse possession works a disseisin of the Commonwealth than a court of law could enter a judgment to that effect. To dismiss a bill on the ground of laches would as clearly impair the obligation of the Seventh Article as to bar a suit at law by limitations. The plain meaning of the Seventh Article is that no wrongful seizure of the lands of the Commonwealth, no matter how long continued, shall in any way diminish its title or bar the

judicial remedy appropriate to the case. It guarantees to the Commonwealth the usual rule that laches does not bar a suit by a State upon its own behalf. As matter of law the defendants cannot invoke or establish laches in order to defeat the bill.

The defendants, at the hearing below, asserted that Res. 1859, c. 103, laid upon the land agent therein named a duty to investigate all lands belonging to the Commonwealth, including the lands along Lake Ontario, and that neglect of this supposed duty showed laches. This contention rests upon failure to observe that the authority is limited to *tide waters*. The material fact of the resolve reads as follows:

> "*Resolved*, that the land agent shall have charge of all lands, flats, shores and rights *in tide waters* belonging to the Commonwealth, except the Back Bay lands and other lands and rights now by law provided for . . . " (with direction to report encroachments upon such property).

This resolve, with its limitation to *tide waters* was reenacted in successive revisions of the statutes (G. S., c. 5, § 3; P. S., c. 19, § 3; R. L., c. 96, § 3; G. L., c. 91, § 3). Mr. Frederick N. Wales, now Executive Secretary of the Department of Public Works, and since 1882 connected with the successive commissions since merged in that Department, testifies that so far as he knows the lands of which the land agent actually took charge were lands bounding upon tide waters, especially round Boston (Rec., pp. 592–593). That this is the true construction is evident from the fact that jurisdiction over encroachments in Great Ponds — ponds of over ten acres, title to which was reserved to the State by the Ordinance of 1641–

47 (Plff.'s Ex. 64) — was not conferred until the enactment of St. 1888, c. 318 (R. L., c. 96, § 15; G. L., c. 91, § 19). Mr. Wales testified that even today there is only an approximately complete list of these ponds in the Department of Public Works. The defendants get little comfort from their misinterpretation of Res. 1859, c. 103.

Under the special circumstances of this case laches is not shown in point of fact. Through the record the Commonwealth broadcasted not only notice of its title but also notice that neither laches nor limitations were available as a defence to suits by it in relation to these treaty lands. Even aside from this treaty provision the Commonwealth was under no obligation to mount guard over its property for the protection of wrong doers.

In Hinkley *v.* New York, 234 N. Y. 309, the court, in holding that an owner of land abutting on the Hudson River, who filled in prior to 1834, and maintained the fill with buildings thereon for over 80 years, did not acquire such adverse possession as would confer title as against the state under the 40 year statute of limitations, even though the state had patented the underwater lands on each side out to the same line, said (p. 319):

"What was the state to do? There are many miles of water front upon the waterways of the state of New York. The upland owners have, as above stated, the right to build wharves and piers for use in navigation. Such user is not adverse. Must the state keep a body of paid employees to constantly inspect all its waterways to see that riparian rights are not pushed beyond lawful limitations? Such a demand upon the resources of the state would be unreasonable. 'Who

is to watch' said the court in Jersey City v. Hall, 79 N. J. L. 559, 574, 'so as to detect within a certain period all encroachments upon the innumerable public highways in the state, or who is to keep similar guard over all parts of its extensive harbors and navigable waters?'"

And in Redfield *v.* Parks, 132 U. S. 239, the court said, by Miller, J. (p. 244):

"It is a well-settled principle that the statute of limitations does not run against a State. If a contrary rule were sanctioned, it would only be necessary for intruders upon the public lands to maintain their possessions, until the statute of limitations shall run; and then they would become invested with the title against the government, and all persons claiming under it. In this way the public domain would soon be appropriated by adventurers. *Indeed, it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result.*" (Italics ours.)

The State of New York had given assurance that no acts of wrongdoers, no matter how long continued, should affect the title or rights of the Commonwealth. The Commonwealth could rightfully assume that the facts of record would in fact be noted and heeded.

Dick *v.* Balch, 8 Pet. 30, 38.
Bank of the United States *v.* Lee, 13 Pet. 107, 122.
Wiser *v.* Lawler, 189 U. S. 260, 271.
Steele *v.* Adams, 21 Ala. 534.
Porter *v.* Wheeler, 105 Ala. 451, 457.
Eltinge *v.* Santos, 171 Cal. 278, 284.
Neal *v.* Gregory, 19 Fla. 356.
Frazee *v.* Frazee, 79 Md. 27, 30.
Throckmorton *v.* Pence, 121 Mo. 50, 60.

Dameron *v.* Jamison, 143 Mo. 483, 491.
Brinckerhoff *v.* Lansing, 4 Johns. Ch. 65, 72.
Spencer *v.* Carr, 45 N. Y. 406.
Fisher *v.* Mossman, 11 Oh. St. 42.
Knouff *v.* Thompson, 16 Pa. 357, 364.
Hill *v.* Epley, 31 Pa. 331, 334.
Garvey *v.* Refractories Co., 213 Pa. 177, 182.
Kingman *v.* Graham, 51 Wis. 232, 248.

To record is of itself sufficient diligence. It is not the record owner's duty to seek out and warn those who may or do deal with the property; it is their duty to seek out and inquire of him.

Porter *v.* Wheeler, 105 Ala. 451, 457.
Bragg *v.* Boston W. R. R. Corp., 9 Allen, 54, 62.
Dameron *v.* Jamison, 143 Mo. 483, 491.
Knouff *v.* Thompson, 16 Pa. 357, 364.
Wiser *v.* Lawler, 189 U. S. 260, 271.

Under these circumstances the Commonwealth, who did not know, and had no reason to know or anticipate the changed physical conditions caused by building the jetties, was not guilty of laches in assuming that persons or corporations charged with notice of its title and of the special protection accorded by the treaty would have sufficient prudence, if not sufficient honesty, to spend two cents in postage or even a few dollars on railroad fare in order to inquire as to its rights.

See Brush *v.* Ware, 15 Pet. 93, 112.

When defendants, with notice of plaintiff's title, chose instead to seize the locus behind the absent owner's back, without a word to the Commonwealth, and

forthwith concealed the wrong by filling up the beach and giving to it the appearance of upland the period when laches would have begun to run except for the Treaty, did not begin until the fraud was discovered in 1920.

Michoud *v.* Girod, 4 How. 503, 561.
Veazie *v.* Williams, 8 How. 134, 158.
Hallett *v.* Collins, 10 How. 174, 177.
United States *v.* Minor, 114 U. S. 233, 238.
(semble) Kirby *v.* Lake Shore R.R., 146 U. S. 130, 136.
McIntyre *v.* Pryor, 173 U. S. 38.
Baker *v.* Schofield, 243 U. S. 114, 120.
Huntington Nat. Bank *v.* Huntington, etc., Co., 152 Fed. 240.
Haney *v.* Legg, 129 Ala. 619, 625.
Phalen *v.* Clark, 19 Conn. 421, 434.
Middaugh *v.* Fox, 135 Ill. 344, 358.
Lewis *v.* Welch, 47 Minn. 193, 203.
Longworth *v.* Hunt, 11 Oh. St. 194, 199.

It is not pretended that the Commonwealth did not move promptly upon discovery of the wrong. The allegation of laches rests primarily upon the fact that defendants successfully concealed it for about forty years.

CONCLUSION

The Commonwealth respectfully asks this court to find and rule:

1. That under the Hartford Treaty Massachusetts took title to that part of the bed of the lake described in Article II.

2. That St. 1788, c. 23, conveyed upland only, leaving title to the beach and bed of the lake in the Commonwealth.

3. That when Shepard bounded lots 20 and 21 by courses, distances and monuments upon the beach, as stated in his notes, he correctly recorded the true construction of St. 1788, c. 23, upon the soil, and thereby fixed the boundary of the Phelps and Gorham tract, so far as the locus is concerned.

4. That the accretions proved in this case belong to Massachusetts as the owner of the beach.

5. That Massachusetts has a clear and unclouded title to the locus in dispute.

In closing the Commonwealth desires to state that if it prevails, it does not wish to embarrass the city of Rochester in the use of the locus as a park during a reasonable period for resumption and conclusion of the negotiations for a sale of the locus to that city. If the court is of opinion that the principle of Georgia v. Chattanooga, 264 U. S. 472, is applicable to this cause, the Commonwealth is willing that provision be made in such decree as the court may enter, for retention of jurisdiction in connection with the alternative prayers of the bill for ascertainment of just compensation, if that should prove necessary.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS.

By JAY R. BENTON,
Attorney General.

EDWIN H. ABBOT, JR.,
Of Counsel.

APPENDIX.

AGREEMENT ENTERED INTO BY THE COMMISSIONERS, APPOINTED TO SETTLE THE CONTROVERSY BETWEEN THE COMMONWEALTH OF **MASSACHUSETTS** AND THE STATE OF **NEW YORK**, RESPECTING LANDS LYING WESTWARD OF **HUDSON'S RIVER**.

To all to whom these Presents shall come,

The underwritten John Lowell, James Sullivan, Theophilus Parsons, and Rufus King, agents or commissioners appointed by the Commonwealth of Massachusetts, of the one part, and the underwritten James Duane, Robert R. Livingston, Robert Yates, John Haring, Melancton Smith, and Egbert Benson, six of the agents or commissioners appointed by the State of New York, of the other part;

SEND GREETING.

Whereas the Commonwealth of *Massachusetts*, did, heretofore present a petition to the United States in Congress assembled, thereby among other things, stating, that all that territory which in the said petition is described as all that part of *New England* in *America*, which lieth and extendeth between a great river, called *Merrimac*, and a certain other river there, called *Charles River*, being the bottom of a bay there called *Massachusetts Bay;* and also, all those lands lying within three English miles to the southward of the southermost part of the said bay, and extending thence northward in latitude to northward of every part of the said river *Merrimac*, and in breadth of latitude aforesaid, extending throughout all the main land, in longitude westwardly to the southern ocean, was the just and proper right of the said Commonwealth, and farther stating, That the State of *New York* had set up a claim to some part of the land beforementioned, the said Commonwealth

did, therefore, by the said petition, solemnly request of the United States in Congress, that Commissioners might be appointed for enquiring into and determining upon the claim aforesaid, of the Legislature of the said Commonwealth, and that such other proceedings respecting the premises, might be had as are by the fœderal government of the said United States, in such case made and provided, as by the said petition filed among the archives of the United States, reference being thereunto had, may more fully appear: And whereas, the State of *New York* doth, in opposition to the said claim of the Commonwealth of *Massachusetts*, claim as the just and proper right of the said State, as well in respect of property, as jurisdiction, all those lands and territories bounded on the north, by the parallel of latitude passing through the said point, place or boundary aforesaid, of three miles to the northward of every part of the said river *Merrimac*, and bounded on the south, by the parallel of latitude passing through the said point or place, situate three miles south of the southermost part of the said bay, called *Massachusetts Bay*, bounded on the west by the limits between the United States and the King of *Great Britain*, and the line of cession from the State of *New York*, to the United States, and bounded on the east by the line agreed on, and established between the late colony of the *Massachusetts Bay*, and the late colony of *New York*, in the year one thousand seven hundred and seventy-three, and from the northern termination of the said line then bounded on the east by the west bank of *Connecticut River:* And whereas, the State of *New York* having been duly notified, did appear by their lawful agents to vindicate such their said right against the said claim of the said Commonwealth; and proceedings were thereupon had in Congress, pursuant to the articles of confederation, in order to the appointment of Commissioners or Judges to constitute a Court for hearing and determining the said matters in question: And whereas, the said *John Lowell*, *James Sullivan*, *Theophilus Parsons* and *Rufus King*, were

afterwards, by a certain commission under the seal of the said Commonwealth, and bearing date the twenty-sixth day of *April*, in the ninth year of the independence of the United States, and made in pursuance of an act of the Legislature of the said Commonwealth, passed the fourteenth day of *March*, in the eighth year of the independence of the United States, and of a resolution of the said Legislature, passed the eighteenth day of the said month of *March* — commissioned to be Agents to manage, conduct and prosecute the claims of the said Commonwealth, to the lands described in the said petition: And whereas, afterwards and pending such proceedings in Congress, the Legislature of the Commonwealth of *Massachusetts*, did, by an act entitled an act impowering the Agents appointed by their government to defend the territory on the west side of *Hudson's River*, against the claims of the State of *New York*, to settle the controversy relative thereto, otherwise than by a fœderal Court, if they shall judge it expedient, enact, That the major part of the said Agents or Commissioners should be fully authorized and empowered to agree with the Agents or Commissioners of the State of *New York*, and settle the controversy respecting the territory aforesaid, by a fœderal Court as appointed by virtue of the confederation, or otherwise in such way and manner as they should judge would comport with justice and the interest of the said Commonwealth; and the Legislature of the State of *New York*, did, by an act entitled, "An act supplementary to the act entitled an act to appoint Agents or Commissioners for vindicating the right and jurisdiction of this State against the claims of the Commonwealth of *Massachusetts*, pursuant to the articles of confederation and perpetual union of the United States," among other things enact, that it should be lawful for the said *James Duane*, *Robert R. Livingston*, *Egbert Benson*, *John Haring*, *Melancton Smith*, and *Robert Yates* and also, *John Lansing*, jun. or any five or more of them, to settle the said contro-

versy between the said State of *New York*, and the said Commonwealth of *Massachusetts*, otherwise than by the said fœderal Court, in such manner as they should judge most conducive to the interest of the said State, as by the said commission and the said several acts relation being thereunto had may appear.

Now therefore knew ye, That the underwritten Commissioners on the part of the Commonwealth of *Massachusetts* and the State of *New York* respectively, having by mutual consent assembled at the city of *Hartford* in the state of *Connecticut*, on the thirtieth day of *November* last, in order to the due execution of their respective trusts, and having duly exchanged and considered their respective powers, and declared the same legal and sufficient after several conferences, and to the end that all interfering claims and controversies between the said Commonwealth of *Massachusetts* and the said State of *New York*, as well in respect of jurisdiction as property, may be finally settled and extinguished, and peace and harmony forever established between them on the most solid foundation — HAVE AGREED, and by these Presents, do mutually for and in behalf of the said Commonwealth of *Massachusetts* and the said State of *New York*, by whom respectively they the said Commissioners have been so appointed and authorized as aforesaid, agree to the mutual cessions, grants, releases and other provisions following, that is to say,

First. The Commonwealth of *Massachusetts* doth hereby cede, grant, release and confirm to the State of *New York* forever, all the claim, right and title which the Commonwealth of *Massachusetts* hath to the government, sovereignty, and jurisdiction of the lands and territories so claimed by the State of *New York*, as herein before stated and particularly specified.

Secondly. The State of *New York* doth hereby cede, grant, release and confirm to the Commonwealth of *Massachusetts*,

and to the use of the Commonwealth, their grantees, and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property, (the right and title of government, sovereignty and jurisdiction excepted) which the State of *New York*, hath of, in, or to two hundred and thirty thousand and four hundred acres, to be located by the Commonwealth of *Massachusetts*, and to be situate to the northward of, and adjoining to the lands granted respectively to *Daniel Cox* and *Robert Lettice Hooper*, and their respective associates, and between the rivers *Owego* and *Chenengo*. And also, of, in or to all the lands and territories within the following limits and bounds, that is to say: Beginning in the north boundary line of the State of *Pennsylvania*, in the parallel of forty-two degrees of north latitude, at a point distant eighty-two miles west from the northeast corner of the State of *Pennsylvania*, on *Delaware River*, as the said boundary-line hath been run and marked by the Commissioners appointed by the States of *Pennsylvania* and *New York* respectively and from the said point or place of beginning, running on a due meridian north to the boundary line between the United States of *America* and the King of *Great Britain;* thence westerly and southerly along the said boundary line, to a meridian which will pass one mile due east from the northern termination of the Streight or waters between *Lake Ontario* and *Lake Erie;* thence south along the said meridian, to the south shore of *Lake Ontario;* thence on the eastern side of the said Streight, by a line always one mile distant from and parrallel to the said Streight, to *Lake Erie;* thence due west to the boundary line between the United States and the King of *Great Britain;* thence along the said boundary line, until it meets with the line of cession from the State of *New York* to the United States; thence along the said line of cession, to the northwest corner of the State

of *Pennsylvania;* and thence east along the northern boundary line of the State of *Pennsylvania* to the said place of beginning: And which said lands and territories so ceded, granted, released and confirmed, are parcel of the lands and territories described in the said petition.

Thirdly. The Commonwealth of *Massachusetts* doth hereby cede, grant release and confirm to the State of *New York*, and to the use of the State of *New York*, their grantees and the heirs and assigns of such grantees forever, the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property, which the Commonwealth of *Massachusetts* hath of, in or to the residue of the lands and territories so claimed by the State of *New York* as herein before stated, and particularly specified.

Fourthly. That the lands so ceded, granted, released and confirmed to the Commonwealth of *Massachusetts*, or such part thereof as shall from time to time be and remain the property of the Commonwealth of *Massachusetts*, shall during the time that the same shall so be and remain such property, be free and exempt from all taxes whatsoever, and that no general or State tax shall be charged on, or collected from the lands hereafter to be granted by the Commonwealth of *Massachusetts*, or on the occupants or proprietors of such lands, until fifteen years after such confirmation, as is hereinafter mentioned, of such grants, shall have expired; but that the lands so to be granted, and the occupants thereof, shall, during the said period, be subject to town or county charges or taxes only; *provided*, That this exemption from general or State taxes, shall not be construed to extend to such duties, excises or imposts, to which the other inhabitants of the State of *New York*, shall be subject and liable.

Fifthly. That no rents or services shall be reserved in any grants to be made of the said lands by the Commonwealth of *Massachusetts*.

Sixthly. That the inhabitants on the said lands and territories, being citizens of any of the United States, holding by grants from the Commonwealth of *Massachusetts*, shall be entitled to equal rights with the other citizens of the State of *New York;* and further, that the citizens of the Commonwealth of *Massachusetts* shall, from time to time, and at all times hereafter, have and enjoy the same and equal rights, respecting the navigation and fishery on and in *Lake Ontario* and *Lake Erie*, and the waters communicating from the one to the other of the said lakes, and respecting the roads and portages between the said lakes, as shall from time to time be had and enjoyed by the citizens of the State of *New York;* and the citizens of the Commonwealth of *Massachusetts* shall not be subject to any other regulations, or greater tolls or duties to be made or imposed from time to time by the State of *New York*, respecting the premises, than the citizens of the State of *New York* shall be subject to.

Seventhly. That no adverse possession of the said lands for any length of time, shall be adjudged a disseizen of the Commonwealth of *Massachusetts.*

Eighthly. That the State of *New York*, so long as any part of the said lands shall be, and remain the property of the Commonwealth of *Massachusetts*, shall not cede, relinquish or in any manner divest themselves of the government and jurisdiction of the said lands or any part thereof, without the consent of the Commonwealth of *Massachusetts.*

Ninthly. That the Commonwealth of *Massachusetts* may from time to time, by persons to be by them authorized for the purpose, hold treaties and conferences with the native Indians, relative to the property or right of soil of the said lands and territories hereby ceded, granted, released and confirmed to the Commonwealth of *Massachusetts*, and with such armed force as they shall deem necessary for the more effectual holding such treaty or conference; and the Commonwealth of *Massachusetts*, within six months after such treaties shall

respectively be made, shall cause copies thereof to be deposited in the office of the Secretary of the State of *New York*.

Tenthly. The Commonwealth of *Massachusetts* may grant the right of pre-emption of the whole or of any part of the said lands and territories to any person or persons, who by virtue of such grant, shall have good right to extinguish by purchase, the claims of the native Indians: *Provided*, however, that no purchase from the native Indians by any such grantee or grantees, shall be valid, unless the same shall be made in the presence of, and approved by a superintendent to be appointed for such purpose by the Commonwealth of *Massachusetts*, and having no interest in such purchase; and unless such purchase shall be confirmed by the Commonwealth of *Massachusetts*.

Eleventhly. That the grantees of the said lands and territories under the Commonwealth of *Massachusetts*, shall within six months after the confirmation of their respective grants, cause such grants or the confirmation thereof, or copies of such grants or confirmations certified or exemplified under the seal of the Commonwealth of *Massachusetts*, to be deposited in the said office of the Secretary of the State of *New York*, to the end that the same may be recorded there, and after the same shall have been so recorded, the grantees shall be entitled to receive again from the said Secretary their respective grants or confirmations, or the copies thereof which soever may have been so deposited, without any charges or fees of office whatsoever, and every grant or confirmation which shall not, or of which shall not be so deposited, shall be adjudged void.

In Testimony Whereof, the said *John Lowell*, *James Sullivan*, *Theophilus Parsons* and *Rufus King*, for and in the name and behalf of the said Commonwealth of *Massachusetts;* and the said *James Duane*, *Robert R. Livingston*, *Robert Yates*, *John Haring*, *Melancton Smith* and *Egbert Benson*, for and in the name and on behalf of the said State of *New York*, have to these presents, and a duplicate thereof, both indented, inter-

changeably set their hands, and affixed their seals; done at the city of *Hartford* aforesaid, the sixteenth day of *December*, in the year of our Lord one thousand seven hundred and eighty-six, and the eleventh year of the Independence of the United States of *America*.

John Lowell,	(L. S.)
James Sullivan,	(L. S.)
Theophilus Parsons,	(L. S.)
Rufus King,	(L. S.)
James Duane,	(L. S.)
Robert R. Livingston,	(L. S.)
Robert Yates,	(L. S.)
John Haring,	(L. S.)
Melancton Smith,	(L. S.)
Egbert Benson,	(L. S.)

Witness present at the sealing and delivery; *George Wyllys, Thomas Seymour, Jesse Root, Jeremiah Wadsworth, D. Humphreys, William Imlay, Joseph Webb, Simeon de Witt, Lewis du Boys, Nathaniel Bethune.*

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1925.
No. 14, ORIGINAL.

271
23

THE COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

against

THE STATE OF NEW YORK, *et al.*,
Defendants.

BRIEF OF DEFENDANT, THE STATE OF NEW YORK.

THE STATE OF NEW YORK,
By ALBERT OTTINGER,
Attorney-General,
Capitol, Albany, N. Y.

ANSON GETMAN,
Of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

THE COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,
vs.
THE STATE OF NEW YORK, *et al.*,
Defendants.

STATEMENT AND CONTENTIONS.

In the year 1620, the King of England granted to the Council established at Plymouth, all that part of America lying and being in breadth from 40° north latitude to 48° north latitude, inclusive, and in length throughout all the mainland from sea to sea.

In the year 1663, the King of Great Britain granted to the Duke of York and Albany the province of New York. The land conveyed extended from a line 20 miles east of the Hudson River westward and from the Atlantic Ocean northerly to the south line of Canada.

In the year 1691, the King and Queen of England granted to the province of Massachusetts Bay in New England, land in America extending on the Atlantic Ocean from north latitude 42° 2′ to 44° 15′ and from the Atlantic to the Pacific Ocean.

The descriptions in the foregoing grants overlapped.

Later, the Commonwealth of Massachusetts succeeded to the rights formerly of the Plymouth and Massachusetts Bay Colonies and the State of New York succeeded to the rights of the Duke of York and Albany. A dispute arose between the two states over a large part of the land now forming the State of New York, including the present western New York.

Commissioners were appointed by the two states to which the dispute or controversy was submitted. These Commissioners met at Hartford, Connecticut, on December 16, 1786, and for the purpose of settling the differences, executed a treaty known as the "Hartford Treaty".

As a result of the Hartford Treaty, the sovereignty, jurisdiction and governmental rights of the State of New York were recognized with respect to all the lands in dispute. In addition, all property rights relating to the lands in the eastern part of the present State of New York were conceded to be in the People of the State of New York.

As a result of the Hartford Treaty, the Commonwealth of Massachusetts secured property rights to lands in present Western New York westerly of a line beginning on the north boundary line of the State of Pennsylvania and running northerly to a point near the present City of Geneva, N. Y., on Seneca Lake, and continuing northerly to the boundary line between the U. S. of America and the King of Great Britain, which was approximately in the center of Lake Ontario measured from south to north; thence westerly and southerly along the latter boundary line.

The question is presented as to the relative rights of the Commonwealth of Massachusetts and the State of New

York to certain lands now or formerly under the waters of Lake Ontario west of the treaty line and south of the international boundary line as above described.

It is contended by the Commonwealth of Massachusetts that by the terms of the Hartford Treaty, the State of New York conveyed to the Commonwealth of Massachusetts such lands under water.

It is contended by the State of New York that by the terms of the Hartford Treaty, the State of New York did not convey to the Commonwealth of Massachusetts such lands under water; that such lands were not the subject of conveyance to or of private ownership or conveyance by the Commonwealth of Massachusetts; that any right or title (if in any sense a subject of title) to such lands was an attribute of sovereignty and remained with the State of New York under the sovereignty clause in said treaty.

Thereafter, the Commonwealth of Massachusetts purported by description to convey certain parts of such lands under the waters of Lake Ontario. It is now contended by the Commonwealth of Massachusetts that certain portions of such lands were not included. Massachusetts now makes claim to same as alleged in the complaint herein.

The defendant, the State of New York, by paragraphs "X" and "XI" of defendants' answer, alleges ownership of the lands under the waters of Lake Ontario west of the treaty line and south of the Canadian boundary line as against any claim of the Commonwealth of Massachusetts.

As a result of the claims of the plaintiff and of the defendant, State of New York, an issue was raised as to lands

under the waters of Lake Ontario in and to which other defendants may have no interest.

There is no issue between the State of New York and the other defendants.

The complaint refers specifically to a parcel of land in the City of Rochester, Monroe County, N. Y., described in paragraph III Part A (last paragraph) of the complaint. It appears that such lands were formerly under the waters of Lake Ontario; that they have been mostly, if not entirely, filled in and are now at an elevation above that of the surface of Lake Ontario at the high stage of the water of said lake.

An issue is presented between plaintiff and other defendants as to whether such fill was natural or artificial.

If such fill resulted from natural accretion to the extent of converting lands under navigable water into uplands, *i. e.*,—an extension of the uplands northerly, the State of New York makes no claim thereto in this action as against the upland owners, on the theory that the upland owner is entitled to the benefits resulting from a natural accretion. In addition, any controversy between the defendants herein is for the state courts to consider.

The issue as to whether the lands have been artificially filled, instead of by accretion, is one between the plaintiff and the defendants other than the State of New York.

The issue between the plaintiff and the defendant, the State of New York, is limited to the construction of the treaty and in particular to the word "sovereignty" used therein

The following are the contentions of the People of the State of New York:

FIRST: The plaintiff, as a result of the Hartford Treaty, acquired title to such lands only as were the subject of private ownership.

SECOND. Lands under the waters of Lake Ontario are not the subject of private ownership but an attribute of sovereignty. They are trust lands, held in trust by the sovereign people of the State (in this case, the people of the State of New York), to be administered for the public good, excepting as to small portions which may be privately utilized for the public benefit or in the public interest under state authority.

THIRD. Although the lands under the waters of Lake Ontario, or certain portions thereof, may be the subject of certain rights, they are not, in their natural state, the subject of ownership as are uplands.

FOURTH. The Commonwealth of Massachusetts, by the Hartford Treaty, in recognizing the sovereignty of the State of New York, could claim no sovereign rights in and to the soil under the waters of Lake Ontario. Whatever of right, title or interest Massachusetts had to such soil, under the above mentioned two Colonial grants, was essentially sovereign in character and when Massachusetts recognized the sovereignty of New York all such right, title and interest passed to New York.

FIFTH. The rights of the Commonwealth of Massachusetts following the Hartford Treaty, must be measured by the rights which any grantee of the Commonwealth or of the State of New York or of any other sovereign state,

might have in and to such lands under water in their natural state. As such lands were incapable of private ownership in an individual, the Commonwealth had no proprietary rights in and to same. There are three main classes of navigable waters:

1. Tide waters.
2. Large lakes.
3. Small lakes and streams.

In considering the rights in and to lands under navigable waters, lands under tide waters and large lakes, such as Lake Ontario, may be considered as alike.

Private rights and ownership of the soil under small lakes and streams even though navigable to a limited degree, have been regarded by the courts as much more extensive.

The issues were referred to Hon. Wade H. Ellis, as Special Master, whose report has been filed with this court.

ARGUMENT.

FIRST.

The nature and character of title to and rights in lands under navigable waters.

A. The Civil and Roman Law.

The people of the earth have, since the early days of the Roman Law, regarded upland or "fast land" in a different light from the banks and beds of navigable streams, lakes and seas. The upland was regarded as the province

of individual ownership and development; the land under water as the domain of the people generally. In Book II, Title I, (pages 78-79) of the Institutes of Justinian (Abdy & Walter translation of 1876) we find it written that:

> "Some things are by the law of nature common to all men, some things are public, some belong to a corporation, some to no one and most to individuals. 1. By the law of nature, then, the following things are common to all men; air, running water, the sea, and consequently the shores of the sea * * * 5. The public use of the seashore is also a part of the law of nations, just as is the use of the sea itself. * * * Yet the ownership of the shore we must consider to belong to no one, but to be subject to the same rules as the sea itself and the ground or sand underneath."

Grotius, the great Dutch commentator, observes ("Introduction to Dutch Jurisprudence" Maasdorp translation 1878) in Book 11, Chap. I, at page 62:

> "16. That things are the property either of all men or of certain large societies of men or of individual men or of no one.
>
> 17. The sea and air are common to all men; having, on account of their vastness and on account of the common service which they have to render, remained undivided amongst men. * * *
>
> 25. The United States of Holland and West Vriesland are the proprietors of the rivers such as the Rhine, the Maas, the Ysel and the Lek insofar as they flow within the limits of Holland; also of the lakes and other navigable waters and of the beds of all such streams and waters, together with the shores or banks of the same."

Van Liewen, in his erudite commentaries on Roman Dutch Law, says (at page 150):

> "Things belonging to a community or society are either Landgemeen or Volkgemen. Landgemeen are those things which belong to an entire political community; such as the waters, streams, rivers, highways,

fords, the navigation of each province; and, likewise, the bed and banks of all waters insofar as the same are for the most part covered with waters. * * * For instance, to the community of Holland and West Vriesland belong the Rhine, Waal, Maas, Ysel, Lek, the lakes and other navigable waters with the bed and banks pertaining thereto. * * * Volkgemeene things are those which belong to a society smaller than a whole civil community. Such are the property of cities, villages, manors, guilds, families, companies and other societies * * * for the general assembling of the States; the halls of villages and manors, markets, churches, guild halls, drilling places, theatres, churchyards, colleges of justice and the like."

In his "History and Principles of the Civil Law of Rome," (1883) Professor Sheldon Amos says, at pages 124 and 125:

"10. The broadest and the most important of all divisions of things was that between things susceptible of appropriation by private persons and things not so susceptible. Things which were not susceptible of appropriation by private persons were: (1) Thing common to everyone, as air, flowing water, the open sea and the seashore. These things were not appropriated even by the State though the use of them as, for instance, in the case of buildings temporarily on the seashore, was regulated by law. * * * (3) Public things; that is, things appropriated by the State for the general use of all persons or the public service, such as the large rivers which were never dry, ports, public squares, edifices, streets and roads and the banks of public rivers so far as their use for navigation went. These things were protected from injury by the executive authority. No person could appropriate them, but everyone could, in subordination to the claims of the government, use them."

The writings of Van Der Linden ("Van Der Linden on the laws of Holland," (1828) and "Institutes of Holland" by Van Der Linden, (1884) page 49) and those of

Grotius ("Introduction to Dutch Jurisprudence" Chap. IX, Sections 8, 9, 12, 13, 14 and 28) recognized the principle of alluvion, whereby the sovereign title is transferred to a new riparian or littoral line formed by the process of gradual filling in by nature. Where there is a loss by encroachment of waters "such inundated land should go to the sovereign * * * for the seashore and the dry beds of rivers belong to him * * *and inundated lands become one with the shore or the beds of rivers, so that they are no longer dry land, but seashore or beds of rivers."

Thus Van Liewen says, at page 178 of his Commentaries:

> "We consider land to have been abandoned and to belong to the county where, an inundation having taken place, the land is overflowed by the sea, rivers or public waters, and continuing to remain in that condition for a period of ten years, afterwards, through the accumulation of mud, again becomes land."

B. The English Law.

Bracton says, speaking with reference to the English law: "In the same way, if the sea encroach upon private land, such land accrues to the Crown, for the shore between high and low water marks belongs to the Crown."

Selden's "Mare Clausum," published in 1635, and Lord Hale's "De Juris Mare" and Mr. Moore's "Foreshore" all set forth an early English law principle to the effect that the sovereign owned the lands under tide-washed waters, including the foreshore to the spring tide. (See "Moore on Foreshore" pages 414-418.) Professor Farnham in his "Waters and Water Rights" (1904) at Vol. I, Sec. 44, pages 212 and 213, says:

"Under the early English Law the King was the State. His power and right to make whatever grants he chose was not questioned. But he never claimed the right to interfere with nature or destroy her gifts. He had not the physical power to destroy the sea and other nations would not have permitted him to do so. Therefore, it was tacitly understood he could make no grant giving an individual authority to do so. So, with the waterways within his kingdom, they were highways by nature, established by a power superior to the King, with which he could not interfere; and he could give his subjects no license to do what he could not do himself. * * * As the powers and prerogatives of the King were gradually restricted, and the doctrine grew up that the King held certain of his rights in trust for his subjects, the rights of navigation and fishery were classed together. * * * It was held that the King held the rights growing out of his interests in the sea for the benefit of his subjects and that he could not make grants which would deprive them of their rights."

C. The Napoleonic Code.

Under the Napoleonic Code (Title 7, Sections 56-563) there was a substantially similar rule. It seems accurate to say that, under all systems of organized government, as far back as we have any valid records, we find that the sovereign people held the banks and beds of their streams. They were the "highways of the world," "the highways of nations." Their use was a heritage for all men, not to be curtailed or abridged. The Colonial rule was similar. In the case of West Virginia Pulp and Paper Company vs. Peck (189 App. Div. 286) it was said; (at page 293): "It is a well known fact that the Colonial Government, as a matter of policy, studiously avoided granting the river bed (Canal Commissioners vs. People, 5 Wendell 423, at page 460)."

D. The Colonial Law did not assume English Riparian Law.

There have been, and still are, those who assert that the law of England regarded the water-covered lands below high water mark as being alienable by the King for private purposes, without regard to the rights of the upland owner or of the general public; and that such English law became the law of the Colony and State of New York. This doctrine seems to have yielded to a new and more logical view in which the English law is seen as entirely consonant with the Civil Law doctrine that such lands are held in an entirely different manner from the uplands. A study of the history of the English law bearing on these questions will establish that, even in England, the Royal power could not grant lands under navigable waters into unrestricted private ownership and that no such right came down into Colonial and State law.

The greed and avarice of the Stuart dynasty early led them to assert absolute right of title in the seas and the lands under them and the foreshore. This theory of royal ownership seems to have had its origin in the argument of a man named Digges. He was a sycophant of Charles I. In an attempt to bolster up the waning fortunes of his royal master—later his appreciative benefactor—Mr. Digges evolved the naive theory that all tide water and tide-flowed land ought to be in the Crown, because the King was the "chief personage in the Kingdom and ought therefore to have the most important kind of water, which was the sea." Aided by a carefully selected and regulated bench of barons, Charles I succeeded in getting the Digges doctrine of *jus privatum*—sometimes called the "*prima facie* rule" —laid down as law in the notorious case of Attorney-General vs. Philpot (1628) (Moore on The Foreshore, pages

262, *et seq.*) (Farnham on Waters, page 167). This astounding decision, and the attempts of Charles I under its authority to exact licenses and fees for grants of fishing privileges, caused a great public upheaval. As Mr. Moore says in his Introduction to "Moore on the Foreshore": "This claim was founded in untruth and injustice, and the too great insistence upon it by Charles I was unquestionably one of the causes of the great revolution." Gradually, the Crown had to relax this rule and qualify it to the extent of recognizing that, while holding title to the land, it held subject to rights of fishing and to access for navigation purposes for the use of its subjects. This was the result of the Grand Remonstrance which preceded the beheading of Charles I in 1649. This qualification upon the Stuart-Digges theory of royal *jus privatum* in the tide washed lands and waters was called *jus publicum.* Thus was born a doctrine which has done more to becloud and confuse the riparian law of New York State than any other agency. This phrase, *jus publicum,* as applied to feudal England, means solely and simply that the King held his preserves and his waters not as an absolute despot, but in trust for his people and that his humblest subject had the right to make that use of the King's property which was necessary in order to pursue his fishing and navigation.

Presently it became necessary for the King, in order to satisfy public demand, to summon Parliament as a body to hear the protests and to voice the demands of his subjects. Little by little Parliament became invested with power to legislate with respect to public rights, subject always to the King's power of veto. There were thus two classes of powers resident in the Crown—one the right of ownership, sometimes called the *jus privatum,* also known as Seigniory, and second the *jus publicum,* also sometimes referred to as

part of the *jure regalium,* more commonly known as the "regalia of the Crown."

The popular demand with respect to the *jus publicum* and for a limitation of the power of the feudal Lord had attained such a vast force in the middle of the 17th Century that at the time when the Stuart dynasty came to a temporary end in 1649 with the beheading of Charles I, the people demanded the right not only to hold their property, but the right to alienate it and to have it descend to their heirs. In 1660, after the infamous Stuarts came back to the Crown, the principles for which Cromwell fought still prevailed and there was enacted the noteworthy statute of Charles II (12 Chas. II, Chap. 24) which finally put the tenure of all lands in England upon the basis of free and common Socage; that is, there was no longer any obligation of religious or military service, but a mere technical holding by recognition of Royal Sovereignty. Much good learning of this is contained in Mr. Fowler's introduction to his work on "The Real Property Law." We find this condition to have prevailed when, in 1664, four years later, the first English claim was made in the new world. After having thrown the Dutch out of the Colony of New York, the English proceeded to claim New York by right of "discovery." Charles I sent his brother, James, Duke of York, to New York under a charter which gave him an enormous tract of land covering a large portion of the Atlantic seaboard and including what is now the State of New York. Under this first "Duke of York Charter" it was provided that he was to hold and to grant out all lands "in free and common socage, only"—"Holden of the Crown." The Charter also contained the provisions that "The laws to be established in the Provinces shall not be contrary to, but as near as may be agreeable to the laws and statutes and

government of the realm of England." Note the words: "As near as may be agreeable." Under the York Government several grants of land under water were made to be held of the Crown. (Martin vs. Waddell, 16 Peters 367 at page 427. Doc. rel. Col. Hist. of N. Y., Vol. V. 370.) The Duke of York held sway until 1673 when the determined Dutch again attempted to assert their rights in the Colony, and succeeded for a brief fifteen month period in gaining a renewed foothold. In the month of June, 1674, however, the English again obtained control over the Colony. At this time a second Charter was granted to the Duke of York, by his brother, Charles II, under which the English held title until 1685 at which time the Duke of York assumed the Crown as James the 2nd. During the time following the forming of the 1st Duke of York's government, and extending down to the time when he became King, the colony was what is known as a Proprietary Colony; that is, held by the Duke of York as a proprietor under the King through a Charter. After the Duke of York acceded to the Crown, however, he held the Colony by virtue of his Royal prerogative and it became what is known as a Crown colony. In 1674 various statutes were enacted known as the "Duke of York's Laws." In 1683 a Colonial assembly met under Governor Dongan and various statutes were enacted in that and the following years, known as "Charter of Liberties" (Doc. Rel. Col. Hist. Vol. III, page 354). On Nov. 2nd, 1683 a law was enacted protecting persons who had for four years "occupied, maintained and improved" lands (Chap. 13, Col. Laws, Office Secy. State). The Assembly of 1691, for the purpose of quieting titles, validated certain colonial grants and annulled others. (Col. Laws of N. Y., Vol. I, page 224). Careful examination of the proceedings of these Colonial Assemblies fails to reveal any statute or resolution of any kind in any way adopting or

even referring to the alleged Brtish "*prima facie* rule" of Royal alienability of lands under navigable waters. (Colonial Laws Vols. I & II.) Those who declare that the common law of England with respect to these subjects became automatically the law of this country will have to find recourse to some other authority than the acts of the People's Assembly itself. As bearing upon the attitude of the Colonists toward under-water lands, attention is directed to a statute passed by the Assembly in 1699 entitled "An Act for Ye Vacateing, Breaking and Annulling of Several Extravagant Grants." Among other grants so characterized as "extravagant" and vacated was one made to John Evans in 1694 purporting to grant land under water and swamp land adjoining the Duke's Farm on Manhattan Island. (Col. Laws Vol. I, page 412.)

From time to time acts were passed materially altering the English laws; as for example, that of 1683 regulating the form in which the interest of a married woman in land could be alienated. In 1782 an act went into effect abolishing the ancient English rule of *primo geniture.* (Chap. 2 Laws of 1782.) In the case of Canal Appraisers against the People, 5 Wend. 423, at page 461, it is pointed out that portions of the English common law were actually rejected by the judiciary of the new province. At all events there is nothing to show that these pioneers in this new country had ever taken over the "*prima facie* rule" of the Stuart monarchs.

These old Colonial statutes have been published by the State of New York pursuant to the provisions of Chapter 125 of the Laws of 1891.

In the meantime, it is interesting to note that the old "*prima facie* rule" of *jus privatum,* out of which emerged

the *jus publicum* had been lying in innocuous desuetude in England. Having, by the 24th Article of the Grand Remonstrance presented to the 1641 Long Parliament, protested against this "taking away of men's rights under color of the King's title to land between high and low water mark," the people demanded that their corrupt judiciary abandon this vicious rule. There seems to have been no judicial affirmation of the *jus privatum* and *jus publicum* rule even in the English courts since the Philpot case (Attorney General v. Philpot, 1678) until after the American Revolution. As an illustration of the feeling which the English judiciary themselves held toward the law of the Philpot case, it is well to quote the remarks made by Baron Wood in the case of Attorney General vs. St. Aubyn (Wightwick, 167, 187) wherein it was said:

> "I must say that I have not much veneration for precedents taken from the arbitrary reigns of these monarchs and I hope I shall not see such precedents revived in this reign; if they do take temporary root they will soon be eradicated."

So that it is safe to say that, even if we had taken all the English common law, which was not the case, it is difficult to prove that the "*prima facie* rule" was good law even in England in 1777.

With the firing of the first gun at the Battle of Lexington came the end for all time of feudalism in America. Seigniory, regalia, *jus privatum* and all the other trappings and furbelows of feudalism went by the board, never to be revived. When "the embattled farmers stood and fired the shot heard 'round the world,' " all the pomp and panopy of feudal England ceased. A new government was formed "deriving its just powers," as said in the Declaration of Independence "*from the consent of the governed*"—"a government of the people, by the people, and for the peo-

ple." To say that in this new-formed democratic government, with its spirit of liberty and freedom from royalty, in a new country, with different physical conditions, the English law of royal private alienability of the people's water highways was automatically transplanted, is to fly in the face of reason and to utter a manifest absurdity. Yet this seems to have been done and upon such a thin reed lean a number of the land under water decisions of this State.

At the close of the Revolution primitive colonial forms of government were established in the various colonies. In 1777, the first constitution was adopted by the Colony of New York. This Constitution contained the following language, "*Such parts of the common law of England* * * * *as* * * * *did form the law of the said Colony on the 19th day of April 1775* * * * *shall be and continue the law of this State.*" This language has been used as authority for the proposition that the 1777 Constitution adopted all of the English law. A mere glance at the language ought to be sufficient to dispose of such a contention, and yet we find eminent judges as late as the year 1921 making this error, in some instances so slavishly following precedent as actually to copy typographical errors from one another. For example, in two decisions of the Court of Appeals the identical error occurs of referring to the Constitution of 1877 and to Section 25 instead of Section 35.

It seems absurd to suppose that a People who after years of bloody revolution had overthrown the yoke of English rule and had made a treaty whereby they became a free government, actually inherited all the laws of their conquered enemy. In the first place, there was a signal difference in political conditions. It needs no citation of

authority to remind anyone as to the character of the infamous Charles I and the equally unspeakable Charles II, the brother of the gentle York. It might be well, however, to bear in mind the fact that the famous Lord Jeffries was the chief of the judiciary under Charles II. Allusion is made to these facts solely for the purpose of applying the test of reason at this point as to whether or not persons who had fled across the Atlantic Ocean in frail boats and hazarded all the risks of pioneering on a strange coast for the sake of freedom, would be likely to have adopted in its entirety the code of legal principles instituted by their recent persecutors. Moreover, looked at from the economic and physical side, it is well to consider that the Colonists had left a country whose rivers were limited in number and whose sea coasts were mainly of a rocky character. England had no large fresh-water lakes; little or no sandy ocean-laved beach; no long navigable rivers lined with railways and wharves; no ocean piers. Recognition of this fact has been had, in the well considered opinion of Justice Davies in the above mentioned case of the *People against Canal Appraisers* (33 N. Y. 461 at page 468). It is there clearly pointed out how utterly inapplicable certain portions of the law of England were to the physical conditions which obtained in the new country. The court said, "But such declaration (*i. e.* the 1777 Constitution) does not compel us blindly and slavishly to incorporate into our system of *juris prudence* principles totally inapplicable to our circumstances and conditions and which would produce absurd results."

It would seem to be of little importance to attempt to differentiate between the early English decisions or to evolve from them a rule of law as to riparian or littoral rights which could in any event be applied in New York State. In the first place, outside of a few fishing cases

there are practically no English cases, decided prior to the American Revolution, relating to foreshore rights, with the possible exception of such decisions as contained in the celebrated *Philpot* case. (Attorney General v. Philpot, 1678.)

The most we can do in any event is to attempt to discover the great underlying principles of the English law and to apply them so far as they were intended to be applied, to decisions in this country—using them, even if applicable, only as "lamps of experience to light our feet, instead of decrees to order our path."

It must be borne in mind at all times in considering these questions, that the title to public property in a democracy resides primarily *in the people themselves*, and that it is an *original* and not a derived title. In 1770 a statute was passed by the Colonial Assembly providing for wharfage and cranage rates (Col. Laws, Vol. V, p. 80). The very first step of the Revolutionary Convention was to make all quit-rents due to the Convention representing the people. (Journal of Provincial Convention, Vol. 1-554.) In 1779 a statute was enacted declaring that *the absolute property of all lands and rents was vested* in the People of the State. (Laws of 1779, Chap. 25—Section 14.) The People in their constitution and statutes since the formation of the State of New York, have always provided that they "*Are deemed to possess in their right of sovereignty the original and ultimate title to all land within the jurisdiction of the State.*" (Vol. I, Revised Laws, page 380; Sec. 2; 1829 Revised Statutes Tit. I, Art. I, Sec. 1; Const. 1845 Art. I, Sec. 11 and subsequent State Constitutions.)

E. The Colony and State of New York asserted original title to all lands held by reason of sovereignty.

From the time when the English monarchy was overthrown, title to lands within the jurisdiction of the colonies became vested in the people; not in the King as a sovereign Every citizen of the colony had an interest in the public land. The fact that the colonial government saw fit by statute to adopt and ratify the grants previously made by the English Crown does not alter the situation. The very act of ratification and adoption was as much a grant of the people's land as though it had been made in the first instance. In the case of *People v. Trinity Church*, 22 N. Y. 44, 46, the Court of Appeals said:

> "The constitution in the clause mentioned (The sovereignty clause) does not declare a mere presumption of a present title which can be repelled by proving a grant from the State, but an absolute rule of political sovereignty * * * The People '*are deemed*,' not presumed, to possess the original and ultimate property, in other words, all private titles are held from them as the political sovereignty, as in England all lands are held under the Crown in the same sense. When by the revolution the Colony of New York became separated from the Crown of Great Britian and a republican government was formed, the people succeeded the King in the ownership of all lands within the State which had not already been granted away and they became from thenceforth the source of all private titles."

The provision which has always been contained in the various constitutions of the State of New York to the effect that "all land shall be held allodially," means that the grantee from the State holds independently of any relation of tenure or obligation to anyone. Such a relation is not inconsistent with the solemn proclamation contained in the various State constitutions to the effect that "The Peo

ple in their right of sovereignty are deemed to possess the original and ultimate title to all lands within the jurisdiction of the State." The latter clause is simply a statement of those inherent rights and powers which are possessed by every free government. These powers include the right of taxation for the support of the government; the right of eminent domain and that widely inclusive power which is generally spoken of as the police power of the State which applies to lands under navigable waters.

F. The People's right has often been regarded as a Trust Title.

As to the "banks and beds of streams," lakes and seas which, as we have seen, could not be granted into private ownership under the Civil Law and which under the English law, were always subject to the so-called "*jus publicum*" we find the following condition in the American cases. One school of thought has viewed such lands as subject to title but has regarded it as a trust title held by the People.

In the *Coxe case*, (144 N. Y. 396) the Court of Appeals in an opinion written by Judge Dennis O'Brien, said (at pages 405, 406, 407):

> "That the dominion and ownership of such lands is in the sovereign for the benefit of the public has long been settled. Such dominion and ownership of property generally implies the power of absolute disposition, but with respect to the land under navigable or tide waters an important limitation has been engrafted upon this power from the nature of the title. The title of the State to the seacoast and the shores of tidal waters is different from the fee simple which an individual holds to an estate in lands. It is not a proprietary but a sovereign right, and it has been frequently said that a trust is engrafted upon this title

> for the benefit of the public of which the State is powerless to divest itself. * * * The title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit." (citing authorities)

This distinction between the character of proprietary and sovereign ownership, and between the incidents flowing from such respective classes of ownership is fully developed in some recent Appellate Division decisions. In the Appellate Division's opinion in *People v. Baldwin*, (197 App. Div. 285) Van Kirk, J., said; (at page 288):

> "There is a well recognized distinction between lands held by the State as sovereign in trust for the public and lands held as proprietor only for the purpose 'of sale or other disposition.' "

Writing again for the Appellate Division, Third Department in *Hinkley v. The State*, (202 App. Div. 570) Van Kirk, J., said; (at page 573):

> "Since the State holds the title to the bed of the river as sovereign in trust for the people, title thereto cannot be acquired by adverse possession."

In Judge Bartlett's opinion in *Re Long Saulte Development Co.* (212 N. Y. 1) it was said (at page 10):

> "As long as the waters are maintained as navigable they remain public waters of the State; and as long as they remain public waters of the State the State is bound to retain control over them in the public interest."

The trust relates to "navigable waters and soils under them."

The Court of Appeals in the *Speedway* case (168 N. Y. 134) said; (at page 143):

"The State holds the title in fee in the tideway, and to the lands under water beyond the same, as trustees for the public in its organized capacity."

In the recent case of *Appleby vs. City of New York* (235 N. Y. 351) the Court of Appeals in an opinion written by Judge Pound said; (at page 362):

"Much that has been said in the cases as to the absolute and uncontrolled power of the State to grant the navigable waters for private purposes as it may grant the dry land it owns is dictum (People vs. Steeplechase Park Co., 218 N. Y. 459; Langdon vs. Mayor, 93 N. Y. 129) and in conflict with rules laid down in other well-considered cases which hold that the so-called *jus privatum*, or absolute ownership of lands under navigable waters, together with the exclusive privilege in the waters themselves, which attached to the English Crown, resides in the people in their Sovereign capacity and cannot be conveyed for private purposes (Town of Brookhaven vs. Smith, 188 N. Y. 74; Barnes vs. Midland R. R. Terminal Co., 193 N. Y. 378)."

It is to be noted that the grant to Massachusetts was for a private—not a sovereign purpose.

The effect of these established rules requires consideration. Do they mean that the sovereign trustee cannot part with his trust *res*—that there is, in effect, what is known in the law relating to trusts of real property, a suspension of the power of alienation?

It will readily be seen that such a result would be, in practice, highly unfortunate in that it would prevent the development of ports and the furtherance of commerce. Harbors would lie idle; river banks would be useless to the very *cestuis* for whose benefit they are held; commerce would lag for want of water outlets; and the wheels of industry would be slowed perceptibly.

At this point, then, we are forced to inquire; is the interest of the Sovereign people a title and to what extent and or what purposes and in what way may such sovereign title be alienated? The answer heretofore made by our courts has been a clear and a reasonable one, if, indeed, the application of it may have been fraught with dangerous possibilities. As the Court of Appeals said in the *Speedway* case 168 N. Y. 134; (see page 144):

> "If the State may use the water ways for any purpose whatsoever, then it is no longer a trustee but an irresponsible autocrat. If it may erect upon our tideways or tide waters any kind of structure that may be suggested by the whim or caprice of those who happen to be in power, it will be possible to destroy navigation and commerce by the very means designed for their preservation and improvement."

Probably the clearest statement of the underlying rule governing transfers of sovereign-owned lands is that contained in the *Coxe* case opinion, 144 N. Y. 396, wherein the Court of Appeals said; (page 406):

> "The title which the State holds and the power of disposition is an incident and part of its sovereignty that cannot be surrendered, alienated or delegated, except for some public purpose, or some reasonable use which can fairly be said to be for the public benefit."

It thus appears that the sovereign trustee may divest itself of title in favor of a subject, provided it be *for a public purpose or some reasonable use for the public benefit.* What constitutes such a "public purpose" or "reasonable use for the public benefit," and just how far the process of granting land under water, as it has been engaged in by the State of New York in the past, has met the tests so laid down, invites particular discussion.

In the *Coxe* case the Court of Appeals held that a statute which attempted to grant to a private corporation the

right to reclaim and drain all or any part of the overflowed land or marshes on Staten Island was unconstitutional; saying in its opinion; (page 408):

> "When we consider that the locality where the operations of the company were to be carried on is the great highway of commerce which should be open and common to all, it is not difficult to see that such power, if upheld, might seriously interfere with the navigation upon the waters, and consequently with the freedom of commerce."

That is to say, such a purpose was not only not a public one, but was, on the other hand, actually contrary to the public interest.

In the *Long Sault* case (212 N. Y. 1) the statute under scrutiny purported to create a private corporation for the purpose of using the St. Lawrence river for power generation purposes, giving such corporation exclusive control over such waters. The Court of Appeals said (page 8):

> "The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public."

This last phrase "or not injurious to the public" seems to sound a discordant note, for has it not been concluded that the use must be more than negatively right and must, moreover, actually be positively beneficial to the public? But the Court of Appeals went on to quote with apparent approval from the *Coxe* decision (at page 407) as follows:

> "For every purpose which may be useful, convenient or necessary to the public, the State has the unquestionable right to make grants in fee or conditionally for the beneficial use of the grantee, or to promote commerce according to their terms. The extensive grant to the City of New York of the lands under water below the shore line around Manhattan Island clearly comes within this principle, since it was a grant to a

> municipality, constituting a political division of the State, for the promotion of the commercial prosperity of the City, and, consequently, of the people of the State. So, also, grants to railroads for rights of way and other facilities for the transaction of their business, made under the authority of the State, have been held valid upon the same principle, as well as to corporations and private persons engaged in commerce or navigation for their necessary or reasonable use. Grants to the owners of the adjoining uplands, either for beneficial enjoyment or commercial purposes, have long been authorized and recognized as one of the uses to which the State may lawfully apply such land."

The Court of Appeals thus seems to have acquiesced in the views set forth in the *Coxe* case that sovereign-owned lands under water may be granted into private ownership for

1. Municipal promotion of commerce or its regulation.
2. Railroad construction and development.
3. Private furtherance of commerce and navigation.
4. Commercial purposes of the upland owners.
5. "Beneficial enjoyment" by upland owners.

The *Long Sault* case opinion then proceeds to hold that the grant there under consideration was not in the public interest for the reason that it, in effect, surrendered control over a large body of water. It was squarely held that a grant of a large area was void, in that it amounted to a surrender of public control over an entire water course. Here, then, is to be found a principle of limitation upon the State's power to grant in respect to the area affected. That which would be permissible with respect to a section of water front becomes reprehensible when extended to an entire waterfront. This same thought finds renewed expression from

Judge Bartlett in his concurring opinion in the well known case of *People vs. Steeplechase Park Company,* (218 N. Y. 459); at page 482:

> "If the grant of lands under water for beneficial enjoyment (or, in other words, in fee simple) was so vast in extent as to amount practically to an alienation of the State's governmental functions along the ocean shore of Long Island, it would, I think, be invalid under the doctrine of Illinois Central Railroad Company vs. Illinois (146 U. S., 387) where the grant exceeded 1,000 acres, embracing the whole outer harbor of Chicago. For example, I should not be willing to construe the statute as authorizing the Commissioners of the Land Office to shut off the public from the entire south shore of Long Island by granting the strand to the upland owners for beneficial enjoyment as a series of amusement parks. But the exclusive grant of a few hundred feet for enjoyment in a manner which does not interfere with navigation, appears to be sanctioned by the letter and spirit of the law, whatever we may think of the wisdom of exercising the power."

It will be noted at this point that the result reached in the *Steeplechase Park* case was due to the fact that an injunction was held not to be permissible to restrain acts done under a grant whose validity had not been attacked, and could not be attacked in that case. Consequently, the remainder of the opinions, including the language quoted becomes *obiter dicta.* This was specifically held in *Appleby v. City of New York,* (235 N. Y. 351, at page 362). The language used by Judge Bartlett, however, deserves careful scrutiny. It is highly important. Insofar as it refers to the principle that a grant which might be valid if applying to a limited area would be invalid when affecting a whole water front, it merely enunciates what had been previously decided in the *Long Sault* case.

The question to be determined in each given case, therefore, would seem to be whether or not the proposed purpose

is in the public interest. Thus far we have seen that such a grant must be:

(a)—Limited in extent so as not to amount to a surrender of control over an entire water front, unless to a municipality by delegation.

(b)—To promote commerce or manufacture.

(c)—For "beneficial enjoyment."

If then, as we have seen, the State cannot itself grant title except in this restricted way, what is there to be said of a claim that there was granted to Massachusetts a large part of the land under the waters of Lake Ontario.

G. The various interests in lands under large lakes and tide waters viewed as mere rights and not title.

There can be no title in anyone—even in the State itself—to the banks and beds of navigable tide waters and lands under large lakes. Such lands are, as the Roman writers said, "the property of all men," part of the law of nature, just as is the use of the sea itself, "common to all men; having on account of their vastness and on account of the common service which they have to render, remained undivided amongst men."

It has quite frequently been asserted heretofore that the soil under navigable waters including the larger lakes and bodies of tide water, was the subject of private owner ship, even in its natural state, save only in those cases where the *area* involved was *large* and such *area* was under a large lake or tide water (People v. Steeplechase Park Co., 218 N. Y., 459) and save also lands under the St. Lawrence river (Matter of Long Sault Development Co., 212 N. Y., 1). There are numerous decisions to the effect that the soil

under upstate rivers (including the Mohawk) (Williams v. City of Utica, 217 N. Y., 162) and lakes, excepting possibly Lake Champlain (Champlain & St. L. R. R. Co. v. Valentine, 19 Barb. 484) and a few other large lakes (Stewart v. Turney, 237 N. Y. 117), might be privately owned even while covered with water and in a natural state, so that if this water should be diverted such soil might be privately utilized. There might likely then, and ever since, have been doubt as to why *area* should be a controlling factor, and if it should be, how it might be defined. Search has been made, accordingly, for some factor in the nature of a *principle* which might be applied to the larger lakes and bodies of tide water.

The principle or principles contended for would make definite, at least to a large degree, that which is indefinite now. A *large area* which may not now be granted and a *small area* which may be granted would have more definite meaning. In this connection it must be borne in mind that so long as lands under navigable waters and the waters thereon, be the area large or small and inside or outside of a harbor line, remain in a state of nature, the public may travel such waters, whether anyone holds a grant to the lands or not. Furthermore, it must be borne in mind that the state court has held that this land (soil) may be utilized or removed in aid of navigation and in the interest of commerce regardless of any grant, and with certain possible exceptions, without any liability (Appleby v. City of New York, 235 N. Y. 351).

Although an upland owner holds a state grant to adjacent lands formerly under navigable waters and the U. S. government has established a bulkhead line and the upland owner has filled in to such line, this line may be moved in-

shore and the fill removed to that extent by or under the direction of the U. S. government in aid of navigation, without liability (Greenleaf Johnson L. Co. v. Garrison, 237 U. S. 251).

The State, too, has rights which it may exercise in aid of navigation and without liability even though it has given a grant.

In any case where a harbor line is appropriate and none has been established, no grant should be regarded as operative as an immediate transfer of title to the soil. The basis of title is contract. When the government grants uplands it contracts that the grantee may presently exclude the public therefrom and that it will not take such lands from the grantee without making just compensation therefor. It grants subject only to the power to tax and subject to the exercise of the police powers. Government cannot legally so contract with regard to lands under large lakes and tide waters (Coxe v. State, 144 N. Y., 396, 407). It may purport to grant a described area and contract that on the filling of such area the public shall be excluded therefrom and that the filled area shall on such filling become the property of the grantee. Then, if the fill is made, and the State should take even for navigation purposes, it would be liable under its contract, assuming the power exists to bind the State. If the State had received a substantial consideration, the State should "in honor and good faith" as stated in the *Coxe* case, restore the consideration paid and possibly make good the losses incurred in consequence of improvements destroyed or made useless.

If there is a time limit in a grant, within which to make a fill, and the state should take before the fill is made and

before the expiration of the time limit, the state might be liable, not because it had taken a title, as it is contended no title had yet passed, but on its contract to vest a title on performance of conditions within a stated time. If no time limit is stated, the time limit would be a reasonable time (First Construction Co. vs. State, 221 N. Y., 295, 318).

The distinction between uplands and lands under water must always be borne in mind. Not all of the rules and principles of law applicable to the former are applicable to the latter and decisions appropriate to uplands may be inappropriate to lands under water.

The mere grant of a stated area of land under water without conditions is not a withdrawal of that area from navigation and may give no right of withdrawal or right to improve any part thereof. In any event it would give no right to exclude the public immediately. Under such circumstances one may fill at his peril, at least in part. In granting lands under large lakes or navigable tide waters, without any specification as to filling, there is no presumption that all of the area may be filled and the contractual right to do so may not be implied. This very point was involved in *Illinois Central R. R. Co. v. Illinois*, 146 U. S., 387, and *People v. Steeplechase Park Co.*, 218 N. Y., 459, both decided, however, by a divided court. It was also involved in *Coxe v. State*, 144 N. Y., 396.

In the *Illinois* case a grant of one thousand acres under the waters of Lake Michigan was held to be void as it embraced a large part of the harbor of Chicago. If the soil could be granted separately, subject to public rights, there was no necessity for holding the grant void in its entirety. It would have been sufficient to have limited the grantee's

use to a smaller area. A similar situation was presented in the *Coxe* case which discussed the limited powers of the legislature in granting lands under navigable waters.

So long as the land is left in a state of nature the grantee should be held to have only a right to a title which *right* would be appurtenant to the upland. This is in accordance with the doctrine laid down by the Court of Appeals in *Archibald v. N. Y. C. & H. R. R. R. Co.*, 157 N. Y., 574, 9 cited in *Smith v. Bartlett*, 180 N. Y., 360, 6, and follows the reasoning in *Peoples Trust Co. v. Schneck*, 195 N. Y., 398, 403. If the grantee owned the soil under water (subject, of course, to certain public rights) as he owned the soil to upland, he might convey the upland or the land under water separately. If this is so, the Court of Appeals was wrong in deciding the *Archibald* case as that court did, especially in view of what was said in the *Peoples Trust Company case.*

H. The necessary elements of title.

No grant of land under large navigable lakes and navigable tide waters immediately transfers title to the soil. This assertion makes necessary an analysis of the word "title." It is a word commonly used with respect to various property rights, sometimes inappropriately. Blackstone defined a complete title as:

1. Right of property.
2. Right of possession, and
3. Possession (Dingey v. Paxton, 60 Miss., 1038, 54).

When upland is granted by the State, the grantee has the exclusive right of possession and may exclude the public

immediately, but a grantee of lands under tide waters and large lakes may not exclude the public except as improvements made by the grantee in the public interest result in excluding the public.

The word "fee" and the words "fee title" are not always accurately used. A "fee" is merely an estate of inheritance and if not conditioned, it may be "a fee simple absolute" or "an absolute fee" (Sec. 31, Real Property Law). An estate of inheritance is an estate in real property (Sec. 30, Real Property Law).

The question is one of *rights* in the first instance, *not title.* Title results only from improvements in the public interest. There is no distinction in fact between a grant which purports to grant the soil and one which grants only the right to fill and thus acquire a so-called title as considered in *First Construction Co. v. State,* 221 N. Y., 295.

The soil under navigable tide waters and large lakes in a natural state is not the subject of private ownership in the sense of "title" or "fee title." The People do not have a proprietary title to this soil, (*Re* Long Saulte Development Co., 212 N. Y. 1, 10), so cannot convey such a title. It is not the subject of ownership like the soil within land highways. As stated, it is primarily only the subject of *rights.* These rights are in the main generally regarded as common law rights and may be divided into two main classifications:

1st. Common law rights of the general public, and

2nd. Common law rights of the adjacent upland owner.

Although the soil may belong to the People of the State, the People do not own the soil in a proprietary sense as they

own the soil to upland, and the People through the duly constituted governmental agencies cannot grant this soil as they grant upland soil. They may, however, withdraw certain limited areas from public user and grant to the upland owner such limited areas when acting in the public interest, thereby destroying or limiting these rights of the public. The question of area and extent immediately becomes involved in determining whether the grant is in the public interest or not. Assuming that the grant is in the public interest, the net result is that the upland owner has acquired public rights which, in addition to his own rights, enable him to utilize the granted areas as he might use uplands and thus have combined rights which, when exercised, amount practically to a title and practically to the same title that he has to his upland, save always and subject to the superior rights of the U. S. government. The upland owner can never have the same *rights,* as against the U. S. government, to lands under or formerly under navigable tide waters or large lakes that he may have to original uplands, and the *title* can never be the same so far as the U. S. government is concerned.

On the theory here advanced, the state granted to defendant, Bartholomay Brewing Co., a portion of the area in dispute, as shown on the map attached to this defendant's answer.

I. The effect of Harbor Line and other regulations.

If a harbor line has not been established, its establishment cannot be prevented simply because lands have been granted beyond it. In case of no improvement, none can be made beyond such line when once established. While the right to improve outward as the harbor line might be

moved outward may continue, the state should be held to have the right to cancel the grant in so far as it affects lands beyond the established line, without liability, on the same theory that the State may cancel any grant if the area granted is too large or is not improved within a reasonable time. The establishment of a harbor line would create a presumption that no improvement could take place beyond that line within a reasonable time.

If for no other reason public policy should make private ownership of the soil under large bodies of navigable waters and in particular large lakes and tide waters, impossible, excepting as same are actually improved in the public interest. Until improved there should be no more than a right to a title to such unimproved portions as might be improved in the public interest and from which the public might lawfully be excluded. The very fact that the soil might be removed to a greater or less extent in aid of navigation and in the interest of commerce, without liability, negatives the idea of private proprietary ownership thereof in its natural state.

J. The Federal Rule.

An analysis of the Federal decisions appears to lend support to the view that there is and can be no title to the banks and beds of navigable waters, and that such lands cannot be the subject of title, but are merely the subject of related rights. These rights—as specified in the Federal decisions appear to be the following:

I. The power of Congress to limit and regulate the use of navigable waters in the interest of navigation under the interstate commerce clause of the Federal Constitution.

Gibbons vs. Ogden, 9 Wheat 1;
Philadelphia Co. vs. Stimson, 223 U. S. 605;
U. S. vs. Chandler Dunbar Co., 229 U. S. 53;
Economy Lt. & Power Co. vs. U. S., 256 U. S. 113;
Union Bridge Co. vs. U. S., 204 U. S. 364;

These Federal powers, in particular, include the right to determine what is an obstruction to navigable waters (Miller vs. N. Y., 109 U. S. 385; Union Bridge Co. vs. U. S., 204 U. S. 364; Gibson vs. U. S., 166 U. S. 269; U. S. vs. Chandler Dunbar Co., 229 U. S. 53).

To regulate navigation by general or special statutes (Gilman vs. Philadelphia, 3 Wall. 713; Economy Lt. & Power Co. vs. U. S., 256 U. S. 113).

To improve in the interest of navigation—itself or by delegation to persons or corporations. (Luxton vs. North River Bridge Co., 153 U. S. 525; Stockton vs. Baltimore R. R. Co., 32 Fed. 9; Un. Pac. R. R. Co. vs. Myers, 115 U. S. 1).

To delegate to the Secretary of War the determination as to whether a structure is an obstruction to navigation. (Miller vs. N. Y., 109 U. S. 385; Lake Shore R. R. Co. vs. Ohio, 165 U. S. 365).

To compel changes in aid of navigation in construction lawfully erected. (Union Bridge Co. vs. U. S., 204 U. S. 364).

As set forth in the opinion of Mr. Justice Strong, in the case of State Freight Tax, (15 Wall. 232):

> "Whenever the subjects over which the power to regulate commerce is asserted are in their nature national, or when they admit of one uniform system or place of regulation, they are within the exclusive control of Congress."

II. There is, secondly, a class of cases in which the powers of State and Nation have been held to be concurrent and where the powers of Congress are not exclusive until they are exercised.

Gibbons vs. Ogden, 9 Wheat 1;
Brown vs. Maryland, 12 Wheat 419;
State of N. Y. vs. Miln, 11 Peters 102;

The New York State decision of *People vs. Hudson River Connecting R. R. Corp.* (228 N. Y. 203), declares this principle (at pages 215-218):

> "The Federal government is possessed of only such powers as are granted to it. All other powers are reserved to the several states. When Congress exercises its authority and acts within its power, all other authority which conflicts or interferes with the Federal power must fall, for the sovereignty of Congress is plenary." * * *
>
> "The authority of the United States over the navigable waters is that of a supreme sovereign in so far as the authority is necessary under the interstate commerce provisions of the constitution. As to all navigable waters it has succeeded to the *jus publicum* as held by the King of England and holds such waters in trust for all the people of the United States under the Constitution."

(See also Southern Railway Co. vs. R. R. Comm. of Ind., 236 U. S. 439 and Pa. R. R. Co. vs. Public Service Comm., 250 U. S. 566).

In the case of *Wisconsin vs. Duluth*, (96 U. S. 379) the United States Supreme Court said, at page 387 of its opinion:

> "Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the government was organized under the Constitution. The only

question ever raised has been how far and under what circumstances the exercise of the power is exclusive of its exercise by the states. And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation, in the absence of any action of the general government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has by any expression of its will, occupied the field, that action was conclusive of any right to the contrary asserted under State authority."

From a close scrutiny of many of the Federal decisions it is maintainable that what the States got, and what the adjacent owners got, in respect to the banks and beds of navigable water courses, was a collection of relative rights and not a title. For example, in the case of *Water Power Co. vs. Water Commissioners,* (168 U. S. 349), the U. S. Supreme Court said (at page 359):

"In Martin vs. Waddell, (16 Pet. 367) it was held that, when the American Revolution was concluded, the people of each state became themselves sovereign, and in that character held the *absolute right* to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the General Government * * * In Pollard vs. Hagan, (3 How. 212) the question arose in regard to the rights of the State of Alabama in the shores of navigable waters and the soils under them within her limits. * * * In Goodtitle vs. Kibbe, (9 How. 471), the decision of this court in Pollard vs. Hagan, *supra,* was inferred to and affirmed, and it was said that, by the admission of the State of Alabama into the union, that state became invested with the sovereignty and dominion over the shores of the navigable rivers between high and low water mark, and that, after such admission Congress could make no grant of land thus situate."

(See also Gilman vs. Philadelphia, 3 Wall 713, 725-730; Kansas vs. Colorado, 206 U. S. 46; 93-94; Ill. Cent. R. R. vs. Ill., 146 U. S. 387, 435-6, 463).

In *Withers vs. Buckley*, (20 How. 84) Mr. Justice Daniel, writing for the Supreme Court, said (at page 93):

> "It cannot be imputed to Congress that they ever designed * * * to withhold from the State of Mississippi, the power of improving the interior of that state, by means either of roads or canals, or by regulating the rivers within its territorial limits, although a plan of improvement to be adopted might embrace or affect the course or flow of rivers situated within the interior of the state. * * * Obviously, and it may be said primarily, among the incidents of that equality (*i. e.* equality of rights between sister states) is the right to make improvements in the rivers, water courses and highways situated within the state."

In *Huse vs. Glover*, (119 U. S. 543), Mr. Justice Field wrote (at page 548):

> "The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois river, and to increase its facilities, and thus augment its growth it has full power. It is only when, in the judgment of Congress its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it * * * * How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned."

Monongahela Navigation Co. case, (145 U. S. 312) and the *Bowman vs. Chicago Rway. Co.* case, (125 U. S. 465) are to the same effect.

In the case of *Scranton vs. Wheeler*, (179 U. S. 141), the United States Supreme Court said (at page 164):

> "If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right

of access ceases alone for that reason to be of value, there is not within the meaning of the Constitution a taking of private property for public use, but only a consequential injury to a *right* which must be enjoyed, as was said in the Yates case, in due subjection to the *rights* of the public."

As said in the *Bowman* case opinion (at page 507):

"The doctrine now firmly established is, that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operations, such as harbor pilotage, the improvement of harbors, establishment of beacons and buoys to guide vessels in and out of ports, the construction of bridges over navigable rivers, the erection of wharves, piers and docks and the like which can be properly regulated only by special provisions adapted to their locality, the State can act until Congress interferes and supersedes its authority."

As to various other *rights* of user and development, see Gloucester Ferry Co. vs. Pa., 114 U. S. 196, (as to ferries) Gibbons vs. Ogden, 9 Wheat. 1, (as to pilots) Wilson vs. Blackbird Creek Marsh, 2 Pet. 245, (as to dams) Cardwell vs. American Bridge Co., 113 U. S. 205, (as to bridges) U. S. vs. Bellingham Bay Co., 176 U. S. 211, (as to booms) and Prosser vs. No. Pac. R. R., 152 U. S. 59, 64, (as to Harbor lines) and Gloucester Ferry Co. vs. Pa. 114 U. S. 196, 214 and The Passenger Cases, 7 How. 282, 470, (as to police powers).

These cases, as will be seen, treat of *rights* and *powers* of State and Nation and not of title. There are, to be sure, such decisions as the *Illinois Central* case, 146 U. S. 387 and *Hobart vs. Hall,* (174 Fed. Rep. 433, 476), and *Hardin vs. Jordan,* (140 U. S. 371, 381), which speak of title, but the trend of judicial thought in the Federal decisions appears to be in the direction of rights and powers. Thus, in the

Hardin case we find the court speaking (at page 381) of "state control and ownership" and "right of the States to develop." Also, in the *Hobart* case we find (at page 475) references to "*such right or title of the State*" and to the "riparian owner's *right or title.*"

So, in the case of the rights of the riparian owner, we find a consistent reference in the Federal cases to rights and not to title. For example, in the case of *U. S. vs. Chandler Dunbar Co.* (229 U. S. 53) we find Mr. Justice Lurton saying (at page 70):

> "That riparian owners upon public, navigable rivers have, in addition to the rights common to the public, certain *rights* to the use and enjoyment of the stream which are *incident* to such *ownership* of the bank, must be conceded."

Mr. Angell, in his Treatise on Watercourses says (Sec. 93-a):

> "By the general law applicable to running streams, every riparian proprietor has a *right* to what may be called the ordinary use of water flowing past his land."

See also Washburn on Easements, 6th Ed. page 288; Gould on Waters, 3rd Ed. Sec. 213 and U. S. vs. Cress (243 U. S. 316) where, at page 321 of the opinion it is said:

> "That riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means."

Also, at page 325,

> "It follows from what we have said that the servitude of privately owned lands forming the banks and bed of a stream to the interests of navigation is a natural servitude."

So, also, in the New York State decisions, do we find these things spoken of as *rights,* as for example in Smith

vs. Rochester (92 N. Y. 463) where (at page 483) it is said that the governmental rights are "easements" and "public rights."

Occasionally we find courts and authors characterizing the public rights as "police powers" (See Ill. Cent. case, 146 U. S. 387, at page 459); article by Paul Fuller, Columbia Law Review, Dec. 1904, and article on "Public and Private Rights in the Foreshore" (Columbia Law Review, December, 1922).

K. General Resumè.

All of these varying interests in the banks and beds of navigable watercourses are merely relative and complementary rights, powers, easements or servitudes, each holding to its own sphere—nation, state or riparian owner—and all of them negativing the idea that, singly or collectively, they can admit of that vital attribute without which there may be no title—viz., the right of exclusive possession.

There would appear therefore, to be two tenable theses:

(a) There is a title and it is held by the People of the State in trust; or

(b) There can be no title and all that can, and do, exist are correlated rights, powers and privileges.

Either of these will defeat the assertions of proprietary title here advanced by this plaintiff.

SECOND.

What force and effect, if any, is to be given to Colonial patents, following the organization of the State of New York?

This question seems to present the following particular aspects:

(a) Was there any rule of international law which required the American Colonies or the State of New York to give faith and credit to assumed Royal grants of land under navigable waters within the bounds of the State?

(b) Did the treaty entered into between the American Colonies and England at the close of the Revolution require that full faith and credit be given to such assumed Royal grants?

(c) Did the so-called ratification clause of the State Constitution of 1777, and subsequently, operate to continue in force and effect assumed Royal grants of lands under navigable waters?

(a) International Law obligations of the Colonies of North America and of the States of the United States.

Let it be said at the outset that there can be no denial of the principle of international law that an individual who has validly gained title to land under a defeated sovereignty, must be protected in such title by a new sovereignty succeeding to the governmental power through conquest or otherwise. This obvious rule has it basis in good conscience and fair dealing. It finds accurate statement in several recognized authorities on international law.

One of the leading decisions on this subject is contained in the action of *United States vs. Percheman* (7 Pet. 86).

Professor Charles Cheney Hyde in his generally recognized "International Law" says, at Section 58, page 94:

> "Rights of private property, validly created, remain unaffected by a change of sovereignty over the territory to which they may be said to belong."

There appears to be a well recognized exception to the general rule in case of a want of power in the granting sovereign.

John Bassett Moore in his "Digest of International Law" says, at Vol. 1, page 419:

> "The rule of international law is that a mere cession of territory only operates upon the sovereignty and jurisdiction, including the right to the public domain, and not upon the private property of individuals which had been *segregated from the public domain* before the cession."
>
> (See also U. S. vs. Arredondo, 6 Pet. 691. U. S. vs. Chaves, 159 U. S. 452, 457).

In a letter written by Secretary of State Bayard to Ambassador Roberts (set out in Moore's Digest at page 422) there is the following statement:

> "War being only a relation of State to State, it follows that one of the belligerents who makes conquests in the territory of the other cannot acquire more rights than the one for whom he is substituted; and that thus, as the invaded or conquered state did not possess any right over private property, so also the invader or conqueror cannot legitimately exercise any right over that property * * Title to *land and landed improvements* is, by the law of nations, a continuous right, not subject to be divested by any retroactive legislation of new governments, taking the place of that by which such title was *lawfully granted*. Of course,

it is not intended here to deny the prerogative of a conqueror to confiscate for political offenses, or to withdraw franchises."

A further statement with respect to titles and rights of a conditional precedent character is set forth by Mr. Hyde (at page 239 "Hyde on International Law") wherein it is said:

> "The United States has been unwilling to admit that the cession to itself of territory has served to lessen the duty of the *grantee of land,* or so to diminish the burdens of an individual claimant as to transform an equitable into a legal title."
>
> (See also Cessna vs. U. S., 169 U. S. 165, 186).

This qualification with respect to conditional titles is adverted to here for the reason that it indicates that, in order to come within the international law rule, it must appear that there was a vested title which required protection and not a mere privilege or basis for future title.

Prof. Francis Bowes Sayre of Williams College in a noteworthy article entitled "Change of Sovereignty and Private Ownership of Land" (Amer. Jurisprudence, Vol. XII, page 475) said (at page 495):

> "There can be no question that United States Courts will not allow a mere cession of territory to the United States to injure or abrogate, *vested rights of land ownership,* legal or equitable, held by individuals at the time of cession. It is equally clear that United States Courts will feel free to disregard mere expectant rights which could not have been enforced as of right in the Courts of the ceding state. Grants which were unenforceable * * * * *because of the want of power in the granting officer* * * * * will clearly not be upheld by the United States Courts."

It therefore appears that the rule of international law had reference solely to the protection of vested title in

"land or landed improvements"; to that which was a trust within the "conscience of the sovereign"; to land which had been *"lawfully granted"* and had been "segregated from *the public domain."*

Can it be said that land under Lake Ontario was the subject of private vested title, could be lawfully granted to an individual, had been "segregated from the public domain" and had become the subject of "landed improvements"? If so, the idea of state sovereignty is a mere mockery, public rights a sham, and Henry Clay was uttering patent sophistry when he said:

> "From the very nature of such a river it must, in respect to its navigable waters, be considered as common to all the nations who inhabit its banks, as a free gift flowing from the bounty of Heaven, intended for all whose lots are cast upon its borders."

(American State Papers, Foreign Relations, Vol. VI, page 762).

If the doctrine of private title in Massachusetts superior to the sovereignty of the State of New York is to prevail, it would seem necessary to stop the discussion of riparian rights, governmental powers and state sovereignty as to any of the large lakes in Western New York.

(b) What effect, if any, did the so-called Ratification Clause of the State Statutes and Constitutions have upon Colonial Grants of Land under Navigable Waters?

In the action of *Peo. ex rel. Howell vs. Jessup* (160 N. Y. 249), a colonial grant was involved. The court found, as a matter of fact, *that the lands under water were not under navigable waters* (see pages 260 and 261 of the opinion). It was held that as the King of England in the opin-

ion of the court had the power to grant title to such lands, there had been a ratification of the Royal grant by reason of the State Constitution. Chief Judge Parker in his opinion, stated (at page 261):

> "Having ascertained * * * that the power resided in the Crown to grant the lands under water, and the control of the waters at this point, we recur again to the Andros and Dongan charters for the purpose of ascertaining what was intended to, and did, pass by them; for the validity of these instruments is not only unchallenged, but is established by previous decisions of this Court, and is affirmed, as we shall later show, by legislation of the colony and the state. Reading the charters in the light of the law at the period of their execution, we find that a sovereign in whom was vested the title to certain lands under water and the waters above them, now the subject of controversy, with the absolute right of disposition thereof, desiring to create a body corporate and politic for the benefit of such of his subjects as were or should become interested therein, did, by the Andros and Dongan charters, create a body corporate and politic, vesting in the trustees of the freeholders and commonalty of a town, which was named Southampton, not only all the lands, but all the swamps, rivers, rivulets, waters, lakes, ponds, brooks, streams, beaches, creeks, harbors, highways, easements, fishing and all other franchises and profits. So, in express terms, and by the use of words about the meaning of which there can be no doubt, the sovereign granted to the trustees for the freeholders and commonalty of the town all the waters within the boundaries contained in the grant, as well as the title to the lands under water and all franchises relating thereto. From the sovereign's point of view, as well as from that of the public, this action was politic; for it lodged in the trustees of the town the authority to do all those things which would enure to the benefit of the inhabitants, of the town, and at the same time it tended to stimulate them to think out such a course of action as should best employ the waters for the public's good."

There is nothing in any of this language which relates to land under navigable waters. Nor is there any reference to private claims of title based on Colonial grant. The thought conveyed by the Court is of "charters," the creation of "a body corporate and politic" and the securing to "trustees for the freeholders and commonalty" of "authority to do all those things which would enure to the benefit of the inhabitants." As the learned Court stated (at page 262):

> "To that end the trustees were invested with the power to management."

At another point in the opinion it was stated that

> "First. They conferred upon the town, in its corporate capacity, the legal title to the uplands and also to the lands under water embraced in the grants. (Citing authorities).
>
> Second. That they granted to the town the exclusive right to control the fishing in such waters. (Citing cases)."

This, as will be observed, relates mainly and primarily to title "in its corporate capacity" and to "right of control." The essential difference to be noted is that the grantee was a communal body politic and that its rights were regarded in the nature of charters or governmental powers. This case, although sometimes cited, is not an authority in favor of a private title as against the People of the State of New York.

Also in the *Mecox Bay* case (116 N. Y. 1) and *Loundes vs. Huntington* (153 U. S. 1) we find recognition of right of "absolute control and management" in towns under similar charters; the *Loundes* case, in addition, having been fortified by a grant from the legislature. The references to title would appear to be purely incidental. The gravamen of the decisions was charter rights of control and regulation in

the interest of bodies politic. (See also Robins vs. Akerly, 91 N. Y. 98 and Hand vs. Newton, 92 N. Y. 88).

The various decisions which appear to sustain colonial grants of land under water have all been rendered in cases in which the alleged colonial grantee has been a municipality or other branch of government; and, even in those cases, the so-called title was held not to be of a proprietary nature.

This fact seems to be worthy of special note. These so-called grants may properly be regarded in the light of charters. As such they constituted delegations from the sovereign to one of its creatures of governmental rights and powers. Under their powers towns and municipalities were organized and functioned. Such bodies politic were in existence when the State was formed. It may well be contended that the ratification clause in the State Constitution (Sec. 25 N. Y. State Const. of 1777) intended to, and did, continue such towns with all their rights and powers. They continued to use such powers and asserted jurisdiction, even, in some instances, over the waters. The courts seem to have held that such charter rights included a title to all lands which, by a fair intendment, were included within their bounds. But—and this is the noteworthy fact—*such title has been held to be a purely governmental one, naked in character,* and subject to the State's power to qualify by regulation and user and, even, to terminate by repealer. The power which gave may take back.

It may readily be perceived that a wide difference exists between a grant of fee simple, allodial title, on the one hand, and of jurisdictional or governmental rights on the other hand. Earlier in this brief, it has been quite conclusively shown that fee simple title may be given to up-

land but not to land under navigable tidewaters or large lakes.

The opinion in the case of *Peo. ex rel. Squires vs. Hand*, (158 App. Div. 510, 516) contained the following language:

> "The fact that these trustees at one time had title to the common lands, and have also title to the lands under water and are vested with riparian rights does not make them the less public. Such title is held in trust for all the inhabitants as a public and governmental agency."

In the case of *Harway Improvement Co. vs. City of New York* (203 A. D. 174; affd. 236 N. Y. 563) the judgment at Special Term decreed that the City's ownership of the lands under water was "subject to the rights of the public and to the further and private rights of the plaintiff and the defendant, Hugh R. Partridge, as owners of the upland." The Court in its decision concluded:

> "That the Town of Gravesend, if it took title to any lands described in the complaint and which were formerly under waters of Gravesend Bay did so in its corporate political capacity, for governmental and public uses, and subject to the power of the Legislature in and about the regulation of navigation."

And this very "corporate political capacity, for governmental and public uses" is the precise status which the United States Supreme Court said in *Hunter v. Pittsburgh* (207 U. S. 161) the State might "at its pleasure modify or withdraw—expend or contract the territorial area—repeal the charter and destroy the corporation."

Mayor vs. Hart, (95 N. Y. 443) involved the construction of a patent from Governor Nicholls to the Inhabitants of Harlem, in which the eastern boundary was given as the East River. The court, in holding that the patent conveyed

title to the town only to high-water mark on the East River, stated (at page 452):

> "Without pursuing the subject in its details it is enough to say that we have discovered no adequate reason for straying from the general rule in construing the Harlem patents, and are satisfied that the river line was at high-water mark."

In the case of *People ex rel. Palmer vs. Travis*, (223 N. Y. 150) there was at issue a Colonial grant to the Town of Boswich. In the opinion written by Judge Andrews (at page 164), it was stated:

> "As we have said, the grant was to a local municipal corporation or quasi-corporation. It is not a deed conveying private property to be interpreted by the rules applicable to cases of that description. It was an instrument upon which was to be founded the institutions of a great political community and in that light it should be regarded and construed. (Martin vs. Waddell, 16 Peters 367, 411). Under these circumstances we think the Town held such lands essentially for public purposes. It was to administer them for the public good (Town of Brookhaven vs. Smith, 188 N. Y. 74). They could not be appropriated so as to interfere with the rights of the public. No substantial use could be made of them. It was much the same kind of ownership as that of the City of New York in certain of its streets and they are held for governmental and public use."

For further authority as to the nature and scope of the title of even a municipality to lands under water, reference is respectfully directed to the cases of Bedlow vs. Floating Dry Dock Co. (112 N. Y. 263) and Matter of City of New York (Speedway) (168 N. Y. 134). In the *Bedlow* case the Court of Appeals said (at page 274 of its opinion):

> "It has been sometimes said that the ownership of the fee in such lands gave the city, as matter of legal right, authority to erect and build such structures thereon as they saw fit to make. We are inclined to think that this proposition to its full extent cannot be main-

tained. The right of control over the navigable waters of the State is a legislative power, and cannot be destroyed by any authority whatever. The right of the People to use the natural public highways of the State is *jus publica* and cannot be taken away or seriously impaired by any legislation whatever."

Again, in the *Speedway* case *(supra)* the Court of Appeals said:

"Even if the grant to the city were of prior, or the same, date with the grant to the Harlem residents, the right of the former to the use of the tideway was limited by the trust which passed with the title."

It seems to be the established law, therefore, that an agency or branch of the government itself cannot use the great water highways—often called "The highways of the world"—in any way except as a delegated public trust. Who is to say that the Commonwealth of Massachusetts or private individuals, grantees of the Commonwealth of Massachusetts, basing alleged title upon a grant made before the State of New York was formed or basing title on the Hartford Treaty, may use the People's domain as their own private estate? That is, in effect, what is asserted here. If Massachusetts got a title, such as is asserted here, it must have been an allodial fee and must, therefore, have carried the right of exclusive possession and user. Such a thing is hardly to be conceived. As was stated in the *Long Saulte* case (212 N. Y. 1) at page 10 "Navigable waters and soils under them" are regarded as one, the trust relation applying to both.

Summary of Argument.

1. Under all systems of jurisprudence prior to the Colonial and State governments of New York—including the English common law—lands under navi-

gable waters have been uniformly regarded as essentially different in character from uplands.

2. The latter have been, and are, the proper subject of absolute grant to individuals by whom such uplands are now held allodially (under New York law) and may be alienated and are descendible, in fee simple absolute.

3. All lands under navigable waters, however, can certainly not be the subject of an allodial individual title while in their natural state.

4. If such lands are the subject of title, in any sense, they can only be held *in trust* by the sovereign, or its delegated inferior, under a public trust.

5. There is certainly much authority for the view that lands under large navigable waters cannot in their natural state be the subject of title, but merely of correlated *rights and powers.*

6. The King of England could not convey an absolute fee to lands under navigable waters; nor could Parliament. There always remained outstanding from every grant an essential element of title, viz: the right to exclusive, allodial possession and user.

7. The original source of all title, under American State Government, and to all rights in, or powers with respect to, the public domain, is the people of each sovereign state.

8. Massachusetts did not acquire a title to the lands under the waters of Lake Ontario either as a result of the two grants from the King of England in 1620 and 1691, respectively, or the Hartford Treaty. Whatever rights Massachusetts had were of a sovereign nature and passed to New York when New York was recognized to be sovereign. These rights are trust rights and still vest in the People of the State of New York except as surrendered by them in reference to small granted areas.

Statement and Contentions Relative to Upland.

Although it is contended that there is no issue between the plaintiff and this defendant as to the title to the upland, this defendant not claiming title to any of such up-

land, yet some consideration may properly be given to the plaintiff's contention that plaintiff still owns some of the upland along the waters of Lake Ontario, including riparian rights appurtenant thereto, in the vicinity of the area granted by the Commissioners of the Land Office of the State of New York to Bartholomay Brewing Company and shown on the map attached to the answer of this defendant.

Plaintiff claims that the Commonwealth of Massachusetts, in any event, had a proprietary title to low water mark (so-called) in accordance with the decision of the Court of Appeals in Stewart v. Turney, 237 N. Y. 117; that in granting uplands, the Commonwealth of Massachusetts at this particular point did not grant to such low water mark; that there was and is an intervening space called "shore," being a part of the upland and lying southerly of the so-called low water mark; that the plaintiff did not grant this strip and that plaintiff has not granted this strip; that it could not be lost by adverse user; that none of the defendants owned any lands at this point extending to the lands under the waters of Lake Ontario.

This defendant does not concede plaintiff's claim and contends that the grant made by the State of New York through the Commissioners of the Land Office to the Bartholomay Brewing Company was authorized. This point is one, however, with which the other defendants are primarily concerned and will not be considered at length and in detail.

The terms "high water," "high water mark," "low water" and "low water mark" apply peculiarly to tide waters. They are commonly used in defining the boundary of lands washed by such waters only. The tide changes

hourly and at stated intervals. The area between the line of "high water" and the line of "low water" is generally referred to as the "shore."

The words "high water mark," "low water mark" and "shore" are not appropriate when used respecting waters not tide waters. Lakes generally rise and fall over a period of months dependent mostly on the amount of rainfall and snowfall, unusually warm springs when the snow melts quickly and long, dry, hot summers during which the lake levels become lower. There are also changes which take place, as in the case of Lake Ontario, when a year or more may elapse between the time of so-called "high water" and the time of so-called "low water." The line of ownership does not fluctuate with these changes in water level and it does not seem reasonable to assume that the plaintiff in this action intended to except a strip subject to these varying conditions. The "shore" of Lake Ontario was and is practically indefinable. There is a line which divides upland and lands under water. It is a single line and not two lines as in case of tide waters where there is a high tide and a low tide. There is no separate shore strip capable of identification along the shore of Lake Ontario. The Bartholomay Brewing Company owned the upland and as against this plaintiff was entitled to the grant of land made to it by the State in 1888 and shown on the map attached to this defendant's answer.

If it should be held however, that the plaintiff is still the owner of an upland strip, then the question arises as to where the boundary line is between such upland strip and the lands under water claimed to be the lands of this defendant. If the plaintiff owned such a strip and could not lose same by adverse possession, there would still be an is-

sue between the plaintiff and this defendant regardless of any other issues in the case.

It is the contention of this defendant that the boundary line between upland and land under the waters of a lake such as Lake Ontario is the line to which vegetation will survive even though subjected to the action of the water. It may be called the "vegetation line." By this is not meant the line to which vegetation grows regardless of the action of the water. A pile of sand or rocks may prevent the growth of vegetation at particular points and there may be no vegetation for a considerable distance back from the "vegetation line." There are generally places, however, along all lake shores or fronts where vegetation grows to a point where the action of the water and not sand or rocks prevents further growth. If a lake should vary five feet in elevation and should be within a foot of the top nine-tenths of the time, vegetation would not be likely to survive more than a foot below the line of high water. If a lake should vary five feet in elevation and should be within a foot of the low water line nine-tenths of the time, vegetation would be likely to survive to a point within one foot of the line of low water. In the first illustration—the boundary line should be one foot below high water or four feet above low water; in the second illustration—the boundary line should be four feet below high water or one foot above low water. It is because lakes generally fall much below the high water mark for a large part of the year that the courts have adopted the so-called "low water line" as the property line. The exact location of this property line was not fixed by the Court of Appeals in Stewart vs. Turney, 237 N. Y. 117. The court in that case rejected the "line of vegetation" as the boundary line but in doing so apparently considered such line as the one where vegetation

would not grow by reason of sand and rocks rather than by reason of the action of the water.

Notwithstanding the decision in Stewart vs. Turney, this court may hold that the "vegetation line,"—the line to which vegetation will grow except for the action of the water, is the property line. The Court, in Stewart v. Turney cited several cases supporting this view.

The decisions cited by the plaintiff on this point relate mainly to tide waters, where the shore is bounded by high and low tide lines, or to natural monuments on or along the shore or near the water. The question most frequently arising as evidenced by such decisions, is whether a conveyance of lands bordering a small lake, pond or stream carries to the center thereof or only to the bank, shore or waters thereof, the words "bank," "shore" and "waters" generally being used synonymously.

Conclusion.

The plaintiff, the Commonwealth of Massachusetts, is asking this court to hold the plaintiff has title to the soil under the waters of Lake Ontario and that it secured same through the Colonial patents under which it claimed title to lands in Western New York generally. Plaintiff claims that the State of New York did not have title to the bed of Lake Ontario; that at most it had only a claim of title which was met by a claim on the part of Massachusetts equally as strong. Neither State had title as the word "title" is generally understood. Whatever rights existed were the rights of the State at the time sovereign and in control. The sovereign people in control really controlled these rights so far as they were subject to control. When

Massachusetts conceded the sovereignty of New York, Massachusetts conceded all of these sovereign rights as existing in New York. This is the legal effect of the Hartford Treaty. Massachusetts apparently fearing that the citizens thereof might not have rights of navigation and fishery on the waters of Lake Ontario as a result of the treaty and the concession of sovereignty to New York, reserved, by the sixth article of the Hartford Treaty, equal rights of navigation and fishing on and in Lake Ontario, to the citizens of Massachusetts. This act alone, regardless of any other question, or the natural legal effect of the treaty, indicates conclusively that Massachusetts thought it necessary to reserve these rights of navigation and fishery. If Massachusetts, as now contended by it, owned the soil under Lake Ontario as it claimed to own the upland, and if it continued to own the soil under Lake Ontario, after the Hartford Treaty, these reservations were unnecessary. They appear to have been unnecessary in any event.

This whole case turns on whether Massachusetts or New York could ever sell the southern part of Lake Ontario as it might the adjacent uplands or some small interior lake or stream, even subject to navigation on the waters comprising Lake Ontario. It is the contention of the People of the State of New York that it could not and that the land under Lake Ontario was not the subject of ownership and conveyance as contended by the plaintiff herein.

If Massachusetts conveyed all of the upland to which the usual common law rights to lands under Lake Ontario adjacent to the upland would attach and be appurtenant, the exact boundary between the upland and the lands under water is not material as between the plaintiff and this defendant.

If the plaintiff still owns any lands along the shore of Lake Ontario which might be regarded as original upland, there would remain an issue between the plaintiff and this defendant as to the extent of such upland, *i. e.*,—the boundary line between the upland and the lands under the waters of Lake Ontario. A claim is made by the plaintiff that Massachusetts, as upland owner, in conveying such upland, did not convey all of such upland to the boundary line between such upland and the lands under the waters of Lake Ontario, at the point particularly involved in this action. Massachusetts contends that the boundary line was the original, (*i. e.*,—before artificial filling) line of low water. The exact location of this line is open to proof and argument. The People of the State of New York contend that the upland ownership extended to the point to which land vegetation would survive the action of the waters over a period of time.

If it should be found that Massachusetts did not in fact part with all of the upland owned by Massachusettts, and that Massachusetts continued and still continues to be an owner of upland, with the incidental riparian rights, then the fill in this case might be regarded as unlawful, both as against Massachusetts and against this defendant. In that event, this defendant can still claim sovereign rights, as above, to the lands formerly under water, as against plaintiff herein.

The defendant, the State of New York, respectfully requests the court to approve the report of the Special Master and to find and decide as follows:

FIRST: That the plaintiff never did and does not now own any part of the lands under the waters of Lake Ontario as the result of Colonial patents or the Hartford Treaty.

SECOND. That as a result of the Hartford Treaty, plaintiff secured title to the upland only, adjacent to Lake Ontario, with the appurtenant common law rights of a riparian owner.

THIRD. That the plaintiff parted with title to such upland at the *locus in quo*.

FOURTH. That this defendant holds the lands under the waters of Lake Ontario, in trust, by virtue of the sovereignty of this defendant which was recognized by the plaintiff herein, subject to the common law rights of the riparian owners.

FIFTH. That the complaint herein should be dismissed.

Dated: February 15, 1926.

Respectfully submitted,

ALBERT OTTINGER,
Attorney General of the State of New York,
Attorney for Plaintiffs.

ANSON GETMAN,
Of Counsel.

Office Supreme Court, U. S.
FILED
OCT 12 1923
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1923.

No. 25, ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

STATE OF NEW YORK, et al.,

Defendants.

ANSWER OF DEFENDANT, CENTRAL UNION TRUST COMPANY OF NEW YORK

DANIEL M. BRACH,
Solicitor for
Central Union Trust Company of New York,
45 Rochester Savings Bank Bldg.,
Rochester, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 28; ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

THE STATE OF NEW YORK; THE CITY OF ROCHESTER; JAMES L. HOTCHKISS, Clerk of the County of Monroe, State of New York; EUGENE VAN VOORHIS, JOHN A. VANDERWERF AND CHARLES C. BEAHAN, as Commissioners of Appraisal; THE NEW YORK CENTRAL RAILROAD COMPANY; ONTARIO BEACH HOTEL & AMUSEMENT COMPANY; CENTRAL UNION TRUST COMPANY OF NEW YORK; THE UPTON COMPANY; ANNA T. GRANGER; EMIL BOSHART; REBECCA BOSHART; BARTHOLOMAY BREWING COMPANY; MILTON J. McINTYRE; BELLE McINTYRE; TWENTIETH WARD CO-OPERATIVE SAVINGS & LOAN ASSOCIATION; AND THE FARMERS LOAN & TRUST COMPANY,

Defendants.

ANSWER OF DEFENDANT CENTRAL UNION TRUST COMPANY OF NEW YORK.

Central Union Trust Company of New York, by Daniel M. Beach, its solicitor, by leave of this Honorable Court, submits the following as its answer to the original Bill of Complaint filed against this defendant by the Commonwealth of Massachusetts through its Attorney General, saving to itself the benefit of all proper exceptions to said Bill of Complaint.

1. It admits that The New York Central Railroad Company is a corporation formed and existing under and by virtue of the Laws of the State of New York, and was formed by the consolidation of several railroad companies, among which were the corporations formerly known as The New York Central & Hudson River Railroad Company, the Windsor Beach & Ontario Railroad Company and the Rome, Watertown & Ogdensburgh Railroad Company, and is the owner of the properties formerly owned by said companies.

2. It alleges that the defendant The New York Central Railroad Company is the owner and holder of the record title to the lands now in the City of Rochester, Monroe County, New York which were conveyed by one Patrick Manrow and Mary Manrow, his wife, to said New York Central & Hudson River Railroad Company by deed dated May 31st, 1881, recorded in the office of the Clerk of the County of Monroe in Liber 341 of Deeds at Page 347, and briefly described as bounded on the north by Lake Ontario, on the east by the westerly line of the pier owned by the United States of America on the west bank of the Genesee River, on the south by Beach Avenue and on the west by Broadway (Lake Avenue), and that said lands are part of the property described in the Bill of

Complaint herein and claimed to be owned by the plaintiff.

It alleges that said The New York Central Railroad Company is the owner and holder of the record title to the lands now in said City of Rochester, New York, which were conveyed by one Martha McIntyre to the Rome, Watertown & Ogdensburgh Railroad Company by deed dated April 27th, 1888, recorded in said Clerk's Office in Liber 440 of Deeds at Page 12, briefly described as a lot on the north side of Beach Avenue thirty feet in width and one hundred seventy-three feet in depth in original lot No. 20, and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

3. It admits that this defendant Central Union Trust Company of New York is a corporation organized and existing under and by virtue of the Laws of the State of New York and was formed by the consolidation of the Central Trust Company of New York and the Union Trust Company of New York, and has succeeded to and acquired all the property of said Central Trust Company of New York.

It is true that on the 1st day of June, 1897 the said New York Central & Hudson River Railroad Company executed and delivered to said Central Trust Company of New York as Trustee a mortgage which conveyed with other real property certain parts of the premises above described, and that on or about the 16th day of April, 1913, the same company executed and delivered to said mortgagee a supplemental mortgage which conveyed with other real property certain parts of said premises of

the defendant The New York Central Railroad Company. It admits and alleges that said original mortgage and supplemental mortgage were duly recorded in the office of the Clerk of the County of Monroe, New York and are existing and valid liens upon the said lands of the defendant The New York Central Railroad Company and that this defendant is acting as Trustee under the provisions thereof.

4. Upon information and belief it denies that any of the deeds or conveyances described in paragraph III, part D, of the Bill of Complaint herein, describe and conveyed or purported to convey any property of the plaintiff, the Commonwealth of Massachusetts, or that they tend to make the real property described in the Bill of Complaint unmarketable or creates a cloud upon or a defect in the title thereto, and denies that at the time of the making of said deeds or conveyances, or any of them, or at any time prior thereto, the plaintiff, the Commonwealth of Massachusetts, had any right, title or interest in and to the real property described in and conveyed thereby.

5. Upon information and belief it denies the allegations contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this court against the defendant, the City of Rochester.

6. It admits that a controversy arose between the State of New York and the plaintiff over conflicting claims to lands in western New York, which claims were settled and determined by the Treaty of Hartford on the 16th day of December, 1786, as alleged in the Bill of Complaint, and that said Treaty was filed and recorded

in the public offices of the State of New York and of the Commonwealth of Massachusetts.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario.

It denies upon information and belief that the lands described in the Bill of Complaint herein of which the plaintiff claims to be the owner were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty; that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and that the said Commonwealth of Massachusetts is the owner or is in possession of said parcel of land.

7. It denies upon information and belief that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor should be paid to parties other than the rightful owners of the land; that the plaintiff is the owner of said lands or any portion thereof and that the lands for the acquisition of which the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, on the 13th day of May, 1919 and on

the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

8. This defendant upon information and belief further alleges that shortly prior to the 26th day of April, 1920, the defendant, The New York Central Railroad Company entered into an agreement with the City of Rochester whereby said defendant surrendered and delivered to the City of Rochester possession of its lands hereinabove described and whereby the City of Rochester agreed to institute condemnation proceedings under the right of eminent domain of the State of New York for the purpose of securing the full legal title to the said lands of said defendant, and to prosecute said proceedings with all convenient speed, and pay the amount awarded by the final report of the Commissioners appointed in accordance with the provisions of law, together with interest thereon.

9. This defendant further alleges upon information and belief that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. That said Common Council, in the exercise of said delegated jurisdiction, authority and right of sovereignty, did by ordinance duly adopted, declare its intention to acqure in fee simple absolute and did declare that it deemed

necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the said lands owned by the defendant, The New York Central Railroad Company. That the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands, and on or about April 28, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said city did enter into possession of the said lands and has ever since been in possession thereof.

10. This defendant further alleges upon information and belief that the said Commissioners of Appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by the defendant, The New York Central Railroad Company and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to said defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of the hearings before the

said Commissioners of Appraisal, and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the Commissioners of Appraisal.

11. It further alleges that said The New York Central Railroad Company was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

12. It alleges that, in and by the Treaty of Hartford, referred to in the bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

13. It further alleges, upon information and belief, that thereafter and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massa-

chusetts had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto; that; on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

14. This defendant further alleges upon information and belief that that part of the lands of the defendant The New York Central Railroad Company above described which was upland, or land out of water, in 1788, was included in the Phelps & Gorham purchase, but that the greater part of the said lands of said defendant was not then out of water, but since 1788 and largely before the year 1844 was formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said upland.

That the title to said land so formed by accretion accrued to said Phelps & Gorham and their successors in title as owners of the upland, and that the chain of title to all of said lands of the defendant The New York Central Railroad Company passed by mesne conveyances from said Phelps & Gorham and their successors to said defendant, and is clear, unimpaired and unbroken from April 1st, 1788, to the present time.

That said defendant Railroad Company and its predecessors in title were in actual, continuous and uninterrupted possession of said lands from the 1st day of April, 1788, until possession was surrendered to the City of Rochester as hereinbefore alleged.

15. The bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and the Commonwealth of Massachusetts has had no right or interest in the above described lands of The New York Central Railroad Company nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

16. This defendant alleges, upon information, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

17. It further alleges, upon information and belief, that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed

pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

18. This defendant further alleges, upon information and belief, that after April 1, 1788, and prior to the month of December, 1920, the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788, the Commonwealth of Massachusetts has not been in possession of said lands, or of the bed of Lake Ontario or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

19. As a further answer and defense this defendant alleges upon information and belief that the defendant, New York Central Railroad Company, and its predecessors in title relying on its and their continued and uninterrupted possession and ownership of its said lands above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open and visible occupation thereof under claim of title did expend large sums of money for taxes thereon which were assessed against said defendant railroad company and its predecessors in title, and did develop and improve said lands and erect many costly structures theron during the term of upwards of seventy years and down to the time of the taking possession of

said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by said defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto; that knowing said improvements were being made, and moneys expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim of interest in said lands to anyone, and by their silence and acquiescence and failure to assert title, encouraged said defendant Railroad Company, and its predecessors in title while in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to and by its grants and conveyances of said lands, abandon and relinquish and forever waive any claim or right or title therein or thereto.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped from making any claim whatsoever in and to any of the lands described in the Bill of Complaint or in and to any of the money payable as awards for the taking thereof under the right of eminent domain by the City of Rochester.

20. This defendant relying upon the long continued and uninterrupted possession and ownership of said lands by the defendant The New York Central Railroad

Company and its predecessors, and upon the record title of said railroad company thereto, and upon the fact that no adverse claim of interest therein had been made by said Commonwealth of Massachusetts, accepted said mortgages above described and the obligations therein imposed upon it, and qualified and is now acting as trustee thereof.

That the said Commonwealth of Massachusetts having failed to assert title or to give notice thereof for a period of upwards of one hundred thirty years, induced this defendant to accept said mortgages, and said Commonwealth of Massachusetts did become and is now estopped from making any claim whatsoever in and to any of said lands of said defendant The New York Central Railroad Company, or to assert any claim therein adverse to the interests of this defendant as Trustee.

21. By the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and ceded to it has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign state, and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

WHEREFORE, this defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

DANIEL M. BEACH,
Solicitor for
Central Union Trust Company of New York,
15 Rochester Savings Bank Building,
Rochester, N. Y.

STATE OF NEW YORK }
COUNTY OF MONROE } ss:

Daniel M. Beach, being duly sworn, deposes and says; that he is the Solicitor of Central Union Trust Company of New York, the defendant herein, and that he has read the foregoing answer of said Central Union Trust Company of New York; that the matters stated in the foregoing answer are true to his own knowledge, except as to the matters therein stated or alleged upon information and belief, and as to those matters he believes it to be true; and that he is duly authorized and empowered to execute this verification on behalf of the Central Union Trust Company of New York.

DANIEL M. BEACH.

Subscribed and sworn to before me,
this 28th day of September, 1922.
GEORGE C. WILCOX,
Notary Public.

(3)

Office Supreme Court, U. S.
FILED
OCT 12 1922
WM. R. STANSBURY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1921

[redacted]14

No. 16, Original

THE COMMONWEALTH OF MASSACHUSETTS, *PLAINTIFF*

v.

THE STATE OF NEW YORK, et als., *DEFENDANTS*

ANSWER OF THE DEFENDANT BARTHOLOMAY COMPANY, INC.

CLARENCE P. MOSER,
Solicitor for Bartholomay Company, Inc.
31 Exchange Street,
Rochester, N. Y.

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 28, Original.

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

THE STATE OF NEW YORK; The City of Rochester; James L. Hotchkiss, Clerk of the County of Monroe, State of New York; Eugene Van Voorhis, John A. Vanderwerf and Charles C. Beahan, as Commissioners of Appraisal; The New York Central Railroad Company; Ontario Beach Hotel & Amusement Company; Central Union Trust Company of New York; The Upton Company; Anna T. Granger; Emil Boshart; Rebecca Boshart; Bartholomay Brewing Company; Milton J. McIntyre; Belle McIntyre; Twentieth Ward Co-Operative Savings & Loan Association and The Farmers Loan & Trust Company,
Defendants.

ANSWER OF DEFENDANT BARTHOLOMAY COMPANY, INC.

Bartholomay Company, Inc., sued herein as Bartholomay Brewing Company, by Clarence P. Moser, its

Solicitor, by leave of this Honorable Court, answers the Bill of Complaint herein as follows, saving to itself the benefit of all proper exceptions to said Bill of Complaint:

1. Upon information and belief, it denies the allegation contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this Court against the defendant, The City of Rochester; it denies that, by the terms of the Hartford Treaty, the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; it denies that the lands described in the Bill of Complaint herein, of which the plaintiff claims to be the owner, were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty; it denies that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and denies that the Commonwealth of Massachusetts is the owner or is in possession of said parcel of land; it denies that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by The City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and denies that the plaintiff is the owner of said lands, or any portion thereof; it denies that the lands, for the acquisition of which the Common Council of The City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919, and the 10th day of Febr uary, 1920, were a part

of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

2. It alleges that it is the owner and holder of the record title to the following described land, located in the Twenty-third Ward in the City of Rochester, by deed from Edward Harris and wife to Bartholomay Brewery Company, dated May 29, 1889, recorded in Liber 450 of Deeds, at page 331, in the Office of the Clerk of Monroe County, New York; by deed from the New York Central Railroad Company to Bartholomay Brewery Company, dated April 17, 1915, and recorded in Liber 968 of Deeds, at page 246, in the Office of the Clerk of Monroe County, New York; and by deed from the New York State Realty & Terminal Company to Bartholomay Brewery Company, dated August 17, 1915, and recorded in Liber 968 of Deeds, at page 248 in the Office of the Clerk of Monroe County, New York:

> Beginning at the intersection of the center line of Beach Avenue with the westerly line of Lake Avenue; running thence northerly along said westerly line of Lake Avenue to the shore of Lake Ontario; thence westerly along the shore of Lake Ontario, five hundred and ninety (590) feet to the westerly line of the premises described in the Bill of Complaint herein; thence southerly along the westerly line of the premises described in the Bill of Complaint herein, parallel to the westerly line of Lake Avenue, to the center line of Beach Avenue; thence easterly along said center line of Beach Avenue, eighty-two and seventy-seven hundredths (82.77) feet; thence north and parallel with said westerly line of Lake Avenue one hundred seventeen and forty-eight hundredths (117.48) feet; thence easterly at right angles with

said last-described line, one hundred (100) feet; thence southerly on a line parallel with said easterly line of Lake Avenue one hundred forty-four and four one-hundredths (144.04) feet to the center line of Beach Avenue; thence easterly along said center line of Beach Avenue four hundred twenty-four and thirty-three hundredths (424.33) feet to the place of beginning,

all of which premises, except the portion thereof south of the north line of Beach Avenue, are included within the description of lands set forth in the Bill of Complaint herein, of which the plaintiff claims to be the owner. The name of the said Bartholomay Brewery Company was duly changed to Bartholomay Company, Inc. July 9, 1919. And this defendant denies that the said deeds above described or that any of the deeds or conveyances described in Paragraph III, Part D, of the Bill of Complaint herein, described and conveyed any property of the plaintiff, the Commonwealth of Massachusetts, or that they tend to make the real property described in the Bill of Complaint unmarketable or create a cloud upon or defect in the title thereto, and denies that at the time of the making of the said deeds or conveyances, or any of them, or any time prior thereto, the plaintiff, the Commonwealth of Massachusetts, was the owner of or had any right, title or interest in and to the real property described in and conveyed thereby.

3. This defendant further alleges that, on or about the first day of July, 1919, it entered into an agreement with the City of Rochester, whereby defendant surrendered and delivered to the City of Rochester the possession of its said lands, and whereby the City of Rochester agreed to institute condemnation proceedings, under the right of eminent domain of the State

of New York, for the purpose of securing the full legal title to the said lands and to prosecute said proceedings with all convenient speed and to pay to the owner of said lands the amount awarded in the final report of the Commissioners appointed, in accordance with the provisions of law, together with interest at the rate of six per cent. per annum on the full amount of said award from July 1, 1919, to the date of the payment of said award.

4. This defendant further alleges that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes, and such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the lands owned by this defendant aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands and, on or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said

order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards, when made, in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said city did enter into possession of the said lands and has ever since been in possesion thereof.

5. This defendant further alleges that the said commissioners of appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by this defendant and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to this defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said commissioners of appraisal and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the commissioners of appraisal.

6. This defendant further alleges that it was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the commissioners of appraisal.

7. This defendant further alleges that, in and by the Treaty of Hartford, referred to in the Bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government,

sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

8. This defendant further alleges that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto; that, on or about the 8th day of July, 1788, by the treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title of the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office

of the Secretary of State of the Commonwealth of Massachusetts.

9. This defendant further alleges that the lands above described and owned by it are a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, or were formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said lands, title to which accrued to said Phelps and Gorham and their successors in title as owners of the uplands, and that the chain of title in and to its said lands passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps and their successors to this defendant and is clear, unimpaired and unbroken from April 1st, 1788, to the present time; that this defendant and its predecessors in title were in actual, continuous and uninterrupted possession of said lands from the 1st day of April, 1788, until the possession thereof was surrendered to the City of Rochester, as hereinbefore alleged.

10. This defendant further alleges that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and that the Commonwealth of Massachusetts has had no right or interest in the above-described lands of this defendant, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

11. This defendant further alleges, upon information and belief, that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

12. This defendant further alleges that the Commonwealth of Massachusetts by a resolve of its Senate

and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

13. This defendant further alleges, upon information and belief, that after April 1, 1788 and prior to the month of December, 1920, the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788, the Commonwealth of Massachusetts has not been in possession of said lands, or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

14. This defendant further alleges that it and its predecessors in title, relying on its and their continued and uninterrupted possession and ownership of its said lands above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open, visible and uninterrupted occupation thereof under claim of title, did expend large sums of money for taxes thereon which were assessed against this defendant and its predecessors in title, and did develop and improve said lands and erect many costly structures thereon during the term of upwards of seventy years and down to the time of the taking of possession of said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers, having jurisdiction over or

responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by this defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto, and knowing that said improvements were being made, and moneys expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim or interest in said lands to this defendant and its predecessors in title, and by their silence and acquiescence and failure to assert title, encouraged this defendant and its predecessors in title, while in possession, to continue said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to, abandon and relinquish and forever waive any interest or claim or right or title in or to any of said lands.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped from making any claim whatsoever in and to any of said lands, or in and to any of the moneys payable as awards for the taking thereof, under the right of eminent domain, by the City of Rochester.

15. This defendant further alleges that by the terms of the Treaty of Hartford, the State of New York, as an attribute of the sovereignty and jurisdiction retained by and ceded to it, has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester, as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign State, and cannot be heard on its application for a writ of injunction re-

straining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

WHEREFORE, This defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

CLARENCE P. MOSER,
Solicitor for Bartholomay Company, Inc.
31 Exchange Street,
Rochester, N. Y.

State of New York, }
County of Monroe. } ss.:

SANDYS B. FOSTER, being by me duly sworn, deposes and says that he is an officer, to-wit, President, of Bartholomay Company, Inc., one of the defendants herein; that the foregoing Answer is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that, as to those matters, he believes it to be true.

SWORN to before me this 28th day of September, 1922. } Sandys B. Foster

WM. C. RODENBECK,
Notary Public, Monroe County.

(4)

Office Supreme Court,
FILED
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WM. R. STANSB
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In the Supreme Court of the United States

OCTOBER TERM, 1921

No. 26, ORIGINAL.

THE COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

THE STATE OF NEW YORK, et al.,

Defendants.

ANSWER OF DEFENDANT ONTARIO BEACH HOTEL & AMUSEMENT COMPANY.

ARTHUR E. SUTHERLAND,
Solicitor for Defendant,
Ontario Beach Hotel & Amusement Company,
Rochester Savings Bank Bldg.,
Rochester, N. Y.

Daily Record Company Rochester, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1921

No. 28, ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff

vs.

THE STATE OF NEW YORK; THE CITY OF ROCHESTER; JAMES L. HOTCHKISS, Clerk of the County of Monroe, State of New York; EUGENE VAN VOORHIS, JOHN A. VANDERWERF AND CHARLES C. BEAHAN, as Commissioners of Appraisal; THE NEW YORK CENTRAL RAILROAD COMPANY; ONTARIO BEACH HOTEL & AMUSEMENT COMPANY; CENTRAL UNION TRUST COMPANY OF NEW YORK; THE UPTON COMPANY; ANNA T. GRANGER; EMIL BOSHART; REBECCA BOSHART; BARTHOLOMAY BREWING COMPANY; MILTON J. McINTYRE; BELLE McINTYRE; TWENTIETH WARD CO-OPERATIVE SAVINGS & LOAN ASSOCIATION AND THE FARMERS LOAN & TRUST COMPANY,

Defendants.

ANSWER OF DEFENDANT ONTARIO BEACH HOTEL AND AMUSEMENT COMPANY.

Ontario Beach Hotel and Amusement Company, one of the defendants, by Arthur E. Sutherland, its solicitor, by leave of this Honorable Court, makes the following as its answer to the original bill of complaint filed against this defendant by the Commonwealth of Massachusetts through its attorney general, saving to said defendant the benefit of all proper exceptions to said bill of complaint.

1. It admits that the said Ontario Beach Hotel and Amusement Company is the owner and holder of the lease of a portion of the real property referred to in the bill of complaint made October 1, 1883 by the New York Central and Hudson River Railroad Company to Henry H. Craig and Eli M. Upton, purporting to convey with other real property to said lessees and their assigns for a term of fifty years from the 1st day of October, 1883 to the first day of October, 1933 that portion of the premises now in the City of Rochester, which the plaintiff seeks to recover in this action which lies north of Beach Avenue and east of Broadway and is bounded on the east by the Genesee River and on the north by the south shore of Lake Ontario.

Said defendant admits that said lease was recorded December 27, 1884 in Liber 389 of Deeds at page 374 in the office of the Clerk of the County of Monroe and State of New York, and was thereafter duly assigned by several mesne assignments, and became the property of the said defendant Ontario Beach Hotel and Amusement Company by an assignment to it by Charles H. Palmer, executed April 24th, 1906, and recorded in said

County Clerk's office May 11, 1906, in Liber 735 of deeds at page 21, and it admits that said lease so held and now owned by the defendant Ontario Beach Hotel and Amusement Company is not void upon its face and creates upon the record a claim of title and ownership which is hostile and adverse to the claim of title to said leased premises now asserted in the Bill of Complaint by the Commonwealth of Massachusetts; but said defendant Ontario Beach Hotel and Amusement Company alleges that the Commonwealth of Massachusetts has no rightful claim or title in or to any portion of said leased premises but that the lawful title in fee in and to said leased premises was in its said lessor New York Central and Hudson River Railroad Company at the time said lease was executed and delivered; and that the possession of said leased premises was taken over by said original lessee immediately upon the delivery of said lease, and possession of said leased premises was continued by them and their assigns and by the defendant Ontario Beach Hotel and Amusement Company under their and its rightful claim of title until the possession thereof was taken over by the City of Rochester for the purposes of a public park on or about the 26th day of April, 1920, subject to the continued ownership of the title in fee of the said lessor and its successors in interest and of the Ontario Beach Hotel and Amusement Company lessee, as will more fully hereinafter be set forth; and that the damages to be awarded to the said Ontario Beach Hotel and Amusement Company are now being judicially ascertained by the commissioners named in the Bill of Complaint, which damages should of right be paid to the said defendant as its indemnity for the taking of its leasehold rights under the power of eminent domain for park purposes by the City of Rochester which is being

exercised under the sovereign authority of the State of New York as will more fully hereinafter be set forth.

2. Said Ontario Beach Hotel and Amusement Company denies that any portion of the lands described in said lease to which the plaintiff now asserts a claim of ownership in the Bill of Complaint was included in the lands or property ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts any title, right or interest in and to any lands which were under the waters of Lake Ontario when said treaty was made.

It denies that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and denies that the Commonwealth of Massachusetts is the owner or is in possession of said parcel of land; it denies that the commissioners of appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor, should be paid to parties other than the rightful owners of the lands and denies that the plaintiff is the owner of said lands, or any portion thereof; it denies that the lands, for the acquisition of which, the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, the 13th day of May, 1919,

and the 10th day of February, 1920, were a part of the lands of plaintiff, or that the plaintiff had any title to or interest in said lands.

And it further denies upon information and belief that the allegation contained in the Bill of Complaint that the plaintiff has brought an action of ejectment in this Court against the defendant the City of Rochester.

3. Said defendant, Ontario Beach Hotel & Amusement Company, alleges that in and by said Treaty of Hartford, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

4. Said defendant alleges that the bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of governmental sovereignty reserved by and ceded to it, and that the Commonwealth of Massachusetts has had no right or interest in the above described lands, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

5. Thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth had in and to the lands ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians therein. On or about the 8th day of July, 1788, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788.

The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham, and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

6. Said defendant alleges that if any part of the land described in the complaint now claimed by the plaintiff, was at the date of the Treaty of Hartford, part of the upland or shore of Lake Ontario west of the Genesee

River, said portion of the land claimed in the complaint is a part of the lands and territories so purchased by Phelps and Gorham from the Commonwealth of Massachusetts and the native Indians, and that the chain of title thereto passed by mesne conveyances from Nathaniel Gorham and Oliver Phelps to this defendant's lessor, and by said lease to the defendant Ontario Beach Hotel & Amusement Company and is clear, unimpaired, and unbroken from April 1, 1788 to the present time; but in this respect the said defendant alleges that it is informed and believes the portion of the premises included in the leasehold held by Ontario Beach Hotel & Amusement Company which is claimed by plaintiff in the Bill of Complaint or the greater part thereof, was under the waters of Lake Ontario at the time the Treaty of Hartford was made and at the time Phelps and Gorham acquired the adjacent upland from the Commonwealth of Massachusetts and from the native Indians, and that said leasehold lands were formed since the date of the Phelps & Gorham purchase by the gradual and natural process of accretion, principally between the years 1829 and 1844, and the lands thus made became part of the lands, property, and estate of the adjacent upland owners, namely Phelps and Gorham or their grantees and successors in title, and became thereby part of the property and real estate of the said predecessors in title of said lessor and of the Ontario Beach Hotel & Amusement Company, and that the title in and to said lands formed by accretion was passed by mesne conveyances from the said true and lawful owners thereof to said Ontario Beach Hotel & Amusement Company and its lessor aforesaid.

7. Said defendant further alleges that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in the complaint herein.

8. Said defendant further alleges that it is informed and believes that since April 1, 1788, the Commonwealth of Massachusetts has not made or asserted a claim of any nature in or to the lands described in the complaint, or in or to the bed of Lake Ontario adjacent, and that since said date, the Commonwealth of Massachusetts has not been in possession of said lands or any part thereof. That during said period of about 130 years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

9. At the date of said lease October 1st, 1883, said Craig and Upton entered into possession of the premises so leased and they and their assigns continued in possession of said premises under said lease until the assignment to said Ontario Beach Hotel and Amusement Company which company took possession of said premises April 24th, 1906, and remained in the sole possession thereof as lessee until April 26th, 1920, when pursuant to the terms of an order of that day made by the Supreme Court of the State of New York, and hereinafter referred to, and by agreement between said City of Rochester

and Ontario Beach Hotel and Amusement Company, the City of Rochester took possession of said leased premises pending the maintenance and conclusion of condemnation proceedings instituted by said City of Rochester for the acquiring of said property under the right of eminent domain for the purposes of a public park. That the City of Rochester agreed with said Ontario Beach Hotel and Amusement Company to prosecute said proceedings with reasonable speed in order that the value of the rights of said Ontario Beach Hotel and Amusement Company as lessee might be justly determined and its damages paid to it for its rights so taken and appropriated.

10. The State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. Such Common Council, in the exercise of said delegated jurisdiction, authority, and right of sovereignty, did, by ordinances duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the complaint herein, including the lands leased by said defendant aforesaid, and the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands in said proceedings. On or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings ap-

pointing three commissioners of appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the Court should determine, and pursuant to said order and said agreement with said defendant, the said city did enter into possession of the said lands and has ever since been in possession thereof.

11. The said Commissioners of Appraisal, and their successors thereafter appointed, who are defendants in this action, duly qualified and have from time to time taken proofs submitted by your petitioner and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to your petitioner or other owners of any of said lands.

12. This defendant has not been deprived of its title as lessee to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

13. That by the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and conceded to it has and was accorded in and by said treaty the right of eminent do-

main over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished sovereignty and governmental jurisdiction over said lands, comes now as a mere proprietor claiming to own lands in the State of New York, and not in the exercise of any right as a sovereign state with respect to said lands, and therefore should not and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain with respect to said lands, and that the defendant commissioners of appraisal are acting as such pursuant to the sovereign political powers and rights delegated by the legislature of the State of New York to the City of Rochester, and that said defendant Commissioners of Appraisal are not exceeding their powers or jurisdiction nor exercising powers not within their cognizance, and that the plaintiff has notice of said condemnation proceedings, has appeared specially therein, and has had and still has full opportunity if it has any interest in said land [which defendant denies] to ask that there be awarded to it compensation by said commissioners for the taking in said condemnation proceedings under the exercise of said power of eminent domain, of any land or any right, title, or interest of any sort therein which the plaintiff may have.

9. That the defendant and its predecessors in title, relying on its and their continued and uninterrupted occupation and ownership of its lands above described and relying upon the fact that no adverse claim thereto or to any part thereof had ever been made, did, during a long term of years and while they were in open and visible occupation thereof under such claim of title, ex-

pend large sums of money for taxes thereon which were assessed against defendant and its predecessors in title and did develop and improve said lands and erect many costly structures thereon during a term of upwards of seventy years and down to the time of taking possession of said lands by the said City of Rochester, and that the Commonwealth of Massachusetts, its executives and general assemblies and all its officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth of Massachusetts had full knowledge of the occupation of said premises through all of said years by the said defendant and its predecessors in title, and had full knowledge that said occupants of said lands were claiming title thereto and did stand by in silence, knowing that said improvements were being made and buildings erected and taxes paid and great outlays made upon said premises by those claiming ownership thereof throughout said long period of time in good faith and under a claim of title, and said Commonwealth of Massachusetts, its executives, general assemblies and officers so having jurisdiction with reference to its lands and properties, made no claim and gave no notice of any claim to the said persons, firms and corporations making said improvements and expenditures as aforesaid, including this defendant Ontario Beach Hotel & Amusement Company, and did thereby encourage the said defendant and those in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did abandon and relinquish and forever waive any claim or right or title in or to any of said lands; and by reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become estopped and is now estopped from making any claim whatsoever in and to any of said lands or in and to

any of the moneys payable in damages for the taking thereof under the right of eminent domain by the City of Rochester.

WHEREFORE, said defendant Ontario Beach Hotel & Amusement Company prays the judgment of this Court dismissing the Complaint herein with costs in favor of said defendant.

ARTHUR E. SUTHERLAND,
Solicitor for Defendant,
Ontario Beach Hotel & Amusement Company,
Rochester Savings Bank Bldg.,
Rochester, N. Y.

STATE OF NEW YORK }
COUNTY OF MONROE } ss:
City of Rochester }

Henry F. Marks, being duly sworn, deposes and says that he is the President of the Ontario Beach Hotel & Amusement Company, one of the defendants in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HENRY F. MARKS.

Sworn to before me this 27th
day of September, 1922.
CLARA M. PERKINS,
Notary Public.

(5)

Office Supreme Court, U.
FILED
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WM. R. STANSBU
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In the Supreme Court of the United States

[redacted]-4, 1921.

No. 28; ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

STATE OF NEW YORK, et al.,

Defendants.

ANSWER OF DEFENDANT, THE NEW YORK CENTRAL RAILROAD COMPANY

DANIEL M. BRACE,
Solicitor for
The New York Central Railroad Company,
15 Rochester Savings Bank Bldg.,
Rochester, N. Y.

In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 28; ORIGINAL.

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

vs.

THE STATE OF NEW YORK; THE CITY OF ROCHESTER; JAMES L. HOTCHKISS, Clerk of the County of Monroe, State of New York; EUGENE VAN VOORHIS, JOHN A. VANDERWERF AND CHARLES C. BEAHAN, as Commissioners of Appraisal; THE NEW YORK CENTRAL RAILROAD COMPANY; ONTARIO BEACH HOTEL & AMUSEMENT COMPANY; CENTRAL UNION TRUST COMPANY OF NEW YORK; THE UPTON COMPANY; ANNA T. GRANGER; EMIL BOSHART; REBECCA BOSHART; BARTHOLOMAY BREWING COMPANY; MILTON J. McINTYRE; BELLE McINTYRE; TWENTIETH WARD CO-OPERATIVE SAVINGS & LOAN ASSOCIATION; AND THE FARMERS LOAN & TRUST COMPANY,

Defendants.

ANSWER OF DEFENDANT, THE NEW YORK CENTRAL RAILROAD COMPANY.

The New York Central Railroad Company, by Daniel M. Beach, its solicitor, by leave of this Honorable Court, submits the following as its answer to the original Bill of Complaint filed against this defendant by the Commonwealth of Massachusetts through its Attorney General, saving to itself the benefit of all proper exceptions to said Bill of Complaint.

1. It admits that The New York Central Railroad Company is a corporation formed and existing under and by virtue of the Laws of the State of New York, and was formed by the consolidation of several railroad companies, among which were the corporations formerly known as The New York Central & Hudson River Railroad Company, the Windsor Beach & Ontario Railroad Company and the Rome, Watertown & Ogdensburgh Railroad Company, and that it is the owner of the properties formerly owned by said companies.

2. It alleges that it is the owner and holder of the record title to the lands now in the City of Rochester, Monroe County, New York, which were conveyed by one Patrick Manrow and Mary Manrow, his wife, to said New York Central & Hudson River Railroad Company by deed dated May 31st, 1881, recorded in the office of the Clerk of the County of Monroe in Liber 341 of Deeds at Page 347, and briefly described as bounded on the north by Lake Ontario, on the east by the westerly line of the pier owned by the United States of America on the west bank of the Genesee River, on the south by Beach Avenue and on the west by Broadway (Lake Avenue), and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

It alleges that it is the owner and holder of the record title to the lands now in said City of Rochester, New York, which were conveyed by one Martha McIntyre to the Rome, Watertown & Ogdensburgh Railroad Company by deed dated April 27th, 1888, recorded in said Clerk's Office in Liber 440 of Deeds at Page 12, briefly described as a lot on the north side of Beach Avenue thirty feet in width and one hundred seventy-three feet in depth in original lot No. 20, and that said lands are part of the property described in the Bill of Complaint herein and claimed to be owned by the plaintiff.

3. It admits that the defendant Central Union Trust Company of New York is a corporation organized and existing under and by virtue of the Laws of the State of New York and was formed by the consolidation of the Central Trust Company of New York and the Union Trust Company of New York, and has succeeded to and acquired all the property of said Central Trust Company of New York.

It is true that on the 1st day of June, 1897 the said New York Central & Hudson River Railroad Company executed and delivered to said Central Trust Company of New York as Trustee a mortgage which conveyed with other real property certain parts of the premises of the defendant above described, and that on or about the 16th day of April, 1913, the same company executed and delivered to said mortgagee a supplemental mortgage which conveyed with other real property certain parts of said premises of this defendant above described. It admits and alleges that said original mortgage and supplemental mortgage were duly recorded in the office of the Clerk

of the County of Monroe, New York and are existing and valid liens upon the said lands of this defendant and that the defendant, Central Union Trust Company is acting as Trustee under the provisions thereof.

4. It admits that on or about the 1st day of October, 1883, said New York Central & Hudson River Railroad Company executed and thereafter delivered to one Henry H. Craig and Levi M. Upton a lease conveying a part of said premises above described for the term of fifty years, and that said lease was thereafter duly assigned to and is now the property of the defendant Ontario Beach Hotel & Amusement Company; that on or about the 25th day of April, 1916, it executed and delivered to the defendant, Emil Boshart a deed to a part of the real property described in and claimed by the plaintiff in the Bill of Complaint herein, and that on or about the 17th day of April, 1915, it executed and delivered to the defendant, Bartholomay Brewing Company now Bartholomay Company, Inc., a deed to a part of the property described in and claimed by the plaintiff in the Bill of Complaint herein.

It denies that said deeds and mortgages above described, or that any of the deeds or conveyances described in paragraph III, part D, of the Bill of Complaint herein, described and conveyed any property of the plaintiff, the Commonwealth of Massachusetts, or that they tend to make the real property described in the Bill of Complaint unmarketable, or create a cloud upon or a defect in the title thereto, and denies that at the time of the making of said deeds or conveyances, or any of them, or at any time prior thereto, the plaintiff, the Common-

wealth of Massachusetts, had any right, title or interest in and to the real property described in and conveyed thereby.

5. Upon information and belief it denies the allegations contained in the Bill of Complaint herein that the plaintiff has brought an action of ejectment in this court against the defendant, the City of Rochester.

6. It admits that a controversy arose between the State of New York and the plaintiff over conflicting claims to lands in western New York, which claims were settled and determined by the Treaty of Hartford on the 16th day of December, 1786, as alleged in the Bill of Complaint, and that said Treaty was filed and recorded in the public offices of the State of New York and of the Commonwealth of Massachusetts.

It denies that by the terms of the Hartford Treaty the State of New York conveyed to the Commonwealth of Massachusetts all of the uplands and lands under water within the boundaries described in said Bill of Complaint, including title to the lands under the waters of Lake Ontario; that the lands described in the Bill of Complaint herein of which the plaintiff claims to be the owner were included in the lands ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty and that the Commonwealth of Massachusetts has never divested itself of its title to the parcel of land described in the Bill of Complaint, and further denies that the said Commonwealth of Massachusetts is the owner or is in possession of said parcel of land.

7. It denies that the Commissioners of Appraisal referred to in the Bill of Complaint are about to report that the damage and compensation which the owners, tenants or occupants of the lands and buildings taken by the City of Rochester have sustained by being deprived thereof, and the amount of compensation which they shall severally receive therefor should be paid to parties other than the rightful owners of the lands, and denies that the plaintiff is the owner of said lands or any portion thereof.

It denies that the lands for the acquisition of which the Common Council of the City of Rochester duly adopted ordinances on the 25th day of February, 1919, on the 13th day of May, 1919 and on the 10th day of February, 1920, were a part of the lands of the plaintiff, or that the plaintiff had any title to or interest therein.

8. This defendant alleges that shortly prior to the 26th day of April, 1920, it entered into an agreement with the City of Rochester whereby it surrendered and delivered to the City of Rochester possession of its lands hereinabove described and whereby the City of Rochester agreed to institute condemnation proceedings under the right of eminent domain of the State of New York for the purpose of securing the full legal title to the said lands of this defendant, and to prosecute said proceedings with all convenient speed, and pay the amount awarded by the final report of the Commissioners appointed in accordance with the provisions of law, together with interest thereon.

9. This defendant further alleges that the State of New York, pursuant to an act of its legislature amending the charter of the City of Rochester, being Chapter 755 of the Laws of 1907, of said State, duly delegated unto the City of Rochester, to be exercised through its Common Council, the sovereign power and jurisdiction of said State to acquire lands and to take real property under the power of eminent domain for the public municipal purposes and uses of said City, including public park purposes. That said Common Council, in the exercise of said delegated jurisdiction, authority and right of sovereignty, did by ordinance duly adopted, declare its intention to acquire in fee simple absolute and did declare that it deemed necessary for park purposes and other municipal purposes the lands described in the Bill of Complaint herein, including the lands owned by this defendant aforesaid. That the City of Rochester has duly performed all acts prescribed by its charter for the institution of condemnation proceedings for the acquisition of said lands, and on or about April 26, 1920, an order was duly made by the Supreme Court in said proceedings appointing three Commissioners of Appraisal to ascertain the compensation or award to which the owners of said lands and parties in interest are entitled; and it was further provided by said order that said City of Rochester should immediately go into possession of said land, said order for the possession thereof being made as provided in Section 445 of the charter of said city on the condition that said city should insure the payment of the awards when made in such manner as the court should determine, and pursuant to said order and said agreement with this defendant, the said City did enter into possession of the said lands and has ever since been in possession thereof.

10. The said Commissioners of Appraisal, and their successors thereafter appointed, duly qualified and have from time to time taken proofs submitted by this defendant and other owners of the value of their said lands so taken, but such proofs are not completed and no awards have been made and no moneys have been paid to this defendant or other owners of any of said lands. The plaintiff had knowledge and information of such condemnation proceedings and of hearings before the said Commissioners of Appraisal, and full opportunity to present proofs of the value of said lands and of its claim of ownership thereto to entitle it to an award, but it failed to avail itself of such opportunity and appeared in said proceedings to object to the jurisdiction of the Commissioners of Appraisal.

11. This defendant further alleges that it was not deprived of its title to its said lands by said condemnation proceedings and the City of Rochester by the terms of Section 452 of its charter will not acquire title thereto until the payment of the awards to be made by the Commissioners of Appraisal.

12. It alleges that, in and by the Treaty of Hartford, referred to in the bill of Complaint, the Commonwealth of Massachusetts ceded, granted and released unto the State of New York, forever, all the claim, right and title which the Commonwealth of Massachusetts had to the government sovereignty and jurisdiction of the lands and territories therein described, and the State of New York ceded, granted and released to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians and all other the estate, right, title

and property (the right and title of government sovereignty and jurisdiction excepted), which the State of New York had to the lands therein described.

13. This defendant further alleges upon information and belief that, thereafter, and on or about the 1st day of April, 1788, the Commonwealth of Massachusetts agreed to sell to Oliver Phelps and Nathaniel Gorham all the right, title and demand which the said Commonwealth of Massachusetts had in and to the lands and territories ceded to it by the State of New York by the Treaty of Hartford, and the said Phelps and Gorham were authorized to extinguish by purchase the claims of the native Indians thereto; that, on or about the 8th day of July, 1788, by the Treaty of Buffalo Creek, said Phelps and Gorham purchased from the native Indians their rights in the easterly one-third of said lands and territories, with all the appurtenances, which purchase was duly confirmed by the Senate and House of Representatives of the Commonwealth of Massachusetts on or about the 21st day of November, 1788. The northern boundary of said easterly one-third is described as running along the shores of Lake Ontario. The remaining two-thirds of said original Phelps and Gorham purchase were relinquished to the Commonwealth of Massachusetts by Phelps and Gorham and thereafter by said Commonwealth of Massachusetts were ceded to Robert Morris, who extinguished the title to the native Indians thereto on the 15th day of September, 1797, by the Big Tree Treaty, so-called, which was duly approved by the said Commonwealth of Massachusetts. The said grants and proceedings are set forth in the records on file in the office of the Secretary of State of the Commonwealth of Massachusetts.

14. This defendant further alleges upon information and belief that that part of the lands of this defendant above described which was upland, or land out of water in 1788, if any, was included in the Phelps & Gorham purchase, but that the greater part of the said lands of this defendant was not then out of water, and since 1788 and largely before the year 1844 was formed by a natural and gradual process of accretion upon the bed of Lake Ontario adjacent to said upland.

That the title to said land so formed by accretion accrued to said Phelps & Gorham and their successors in title as owners of the upland, and that the chain of title to all of said lands of this defendant passed by mesne conveyances from said Phelps & Gorham and their successors to this defendant, and is clear, unimpaired and unbroken from April 1st, 1788, to the present time.

15. That this defendant and its predecessors in title were in actual, continuous and uninterrupted possession of said lands of this defendant hereinabove described from the 1st day of April, 1788, until possession thereof was surrendered to the City of Rochester as hereinbefore alleged.

The bed of Lake Ontario, being a navigable body of water, was retained by the State of New York under the Treaty of Hartford as an attribute and necessary adjunct of the right and title of sovereignty reserved by and ceded to it, and the Commonwealth of Massachusetts has had no right or interest in the above described lands of this defendant, nor in the land under the waters of Lake Ontario since the 16th day of December, 1786.

16. This defendant further shows, upon information that the Commonwealth of Massachusetts now claims that the lands described in said Bill of Complaint have been formed upon the bed of Lake Ontario since April 1, 1788.

17. It alleges, upon information, that the Commonwealth of Massachusetts by a resolve of its Senate and House of Representatives on June 20, 1792, and by action of its Superintendent duly appointed pursuant to the terms of the Treaty of Hartford, in approving the Treaty of Big Tree with the native Indians on September 15, 1797, formally stated and acknowledged that said Commonwealth had no further right or interest in or to the bed of Lake Ontario or in the lands described in said Bill of Complaint.

18. Further answering this defendant alleges, upon information and belief, that after April 1, 1788 and prior to the month of December, 1920 the Commonwealth of Massachusetts did not make or assert a claim of any nature in or to the lands described in said Bill of Complaint, or in or to the bed of Lake Ontario adjacent thereto, and that since said date of April 1st, 1788 the Commonwealth of Massachusetts has not been in possession of said lands, or any part thereof. That during said period of over one hundred and thirty years the State of New York has claimed title to the bed of Lake Ontario to the center thereof, and has made one or more conveyances of title to portions thereof.

This defendant and its predecessors in title relying on its and their continued and uninterrupted possession

and ownership of its said lands above described, and upon the fact that no adverse claim thereto, or to any part thereof, had ever been made, and while they were in open and visible occupation thereof under claim of title did expend large sums of money for taxes thereon which were assessed against this defendant and its predecessors in title, and did develop and improve said lands and erect many costly structures thereon during the term of upwards of seventy years and down to the time of the taking of possession of said lands by the City of Rochester; that the Commonwealth of Massachusetts, its executives and officers having jurisdiction over or responsibility for any lands or properties belonging to said Commonwealth, had full knowledge of the occupation of said premises through all of said years by this defendant and its predecessors in title, and had full knowledge and due notice through the public records of deeds and conveyances that said occupants of said lands claimed title thereto; that knowing said improvements were being made, and moneys were being expended upon said premises, by those claiming ownership thereof, said Commonwealth, its executives and officers, made no claim and gave no notice of any claim or interest in said lands to this defendant and its predecessors in title, and by their silence and acquiescence and failure to assert title, encouraged this defendant and its predecessors in title while in possession to continue said expenditures and improvements, and said Commonwealth of Massachusetts did thereby and by its public acts above referred to and by its grants and conveyances of said lands abandon and relinquish and forever waive any claim or right or title therein or thereto.

By reason of the premises this defendant alleges that the Commonwealth of Massachusetts did become

estopped from making any claim whatsoever in and to any of said lands, or in and to any of the money payable as awards for the taking thereof under the right of eminent domain by the City of Rochester.

20. This defendant relying upon the long continued and uninterrupted possession and ownership of said lands by it and its predecessors, and upon its record title thereto, and upon the fact that no adverse claim of interest therein had been made by said Commonwealth of Massachusetts, executed and delivered said mortgages above described to the defendant Central Union Trust Company of New York.

That said Commonwealth of Massachusetts having failed to give notice or claim of its alleged interest in said lands, and having failed to assert title or to give notice thereof for a period of upwards of one hundred thirty years, induced this defendant to execute and deliver said mortgages, and said Commonwealth of Massachusetts did thereby and by its said public acts become estopped and is now estopped from making any claim whatsoever in and to any of said lands of this defendant, or to assert any claim therein adverse to the interests of the defendant Central Union Trust Company of New York as Trustee.

21. By the terms of the Treaty of Hartford the State of New York as an attribute of the sovereignty and jurisdiction retained by and ceded to it has the right of eminent domain over the lands in question, and could and did delegate such right to the City of Rochester as hereinbefore stated. The plaintiff having relinquished the sovereignty and jurisdiction over said lands comes now

as a mere proprietor claiming to hold lands in the State of New York and not in its right as a sovereign state, and cannot be heard on its application for a writ of injunction restraining the State of New York and the City of Rochester in the exercise of the sovereign right of eminent domain.

WHEREFORE, this defendant prays that the plaintiff's Bill of Complaint be dismissed, with costs to this defendant.

DANIEL M. BEACH,
Solicitor for
The New York Central Railroad Company,
15 Rochester Savings Bank Building,
Rochester, N. Y.

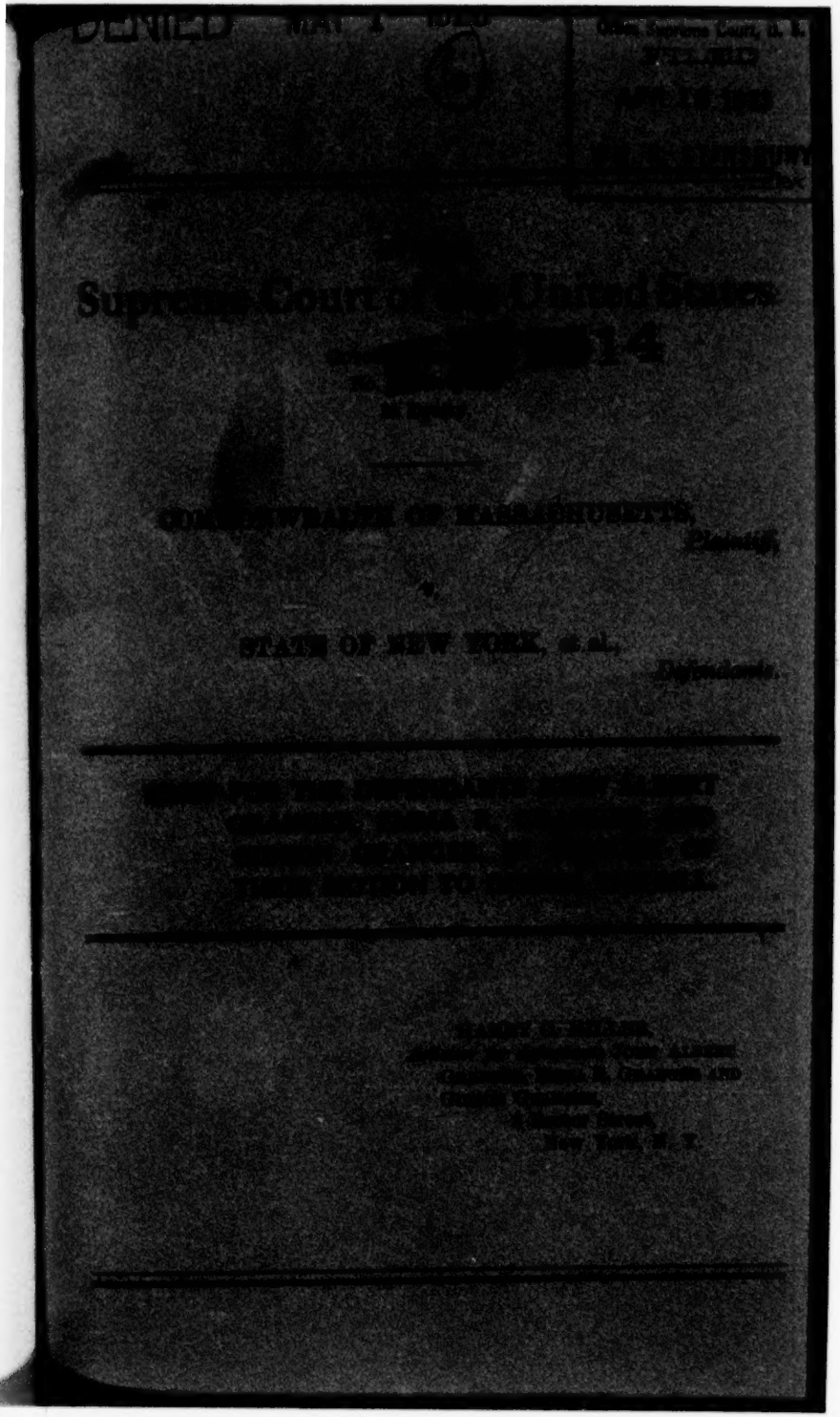
STATE OF NEW YORK }
COUNTY OF MONROE } ss:

Daniel M. Beach, being duly sworn, deposes and says; that he is the Solicitor of The New York Central Railroad Company, the defendant herein, and that he has read the foregoing answer of said The New York Central Railroad Company; that the matters stated in the foregoing answer are true to his own knowledge, except as to the matters therein stated or alleged upon information and belief, and as to those matters he believes it to be true; and that he is fully authorized and empowered to execute this verification on behalf of The New York Central Railroad Company.

DANIEL M. BEACH.

Subscribed and sworn to before me,
this 28th day of September, 1922.

GEORGE C. WILCOX,
Notary Public.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 20; Original. In Equity.

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

STATE OF NEW YORK, et al.,
Defendants.

BRIEF FOR THE DEFENDANTS JOHN ALBERT GRANGER, EMMA R. GRANGER AND GIDEON GRANGER, IN SUPPORT OF THEIR MOTION TO DISMISS THE BILL.

Statement.

On May 12, 1922 the Commonwealth of Massachusetts filed an original bill in equity in this court. On February 26, 1923, upon motion of the plaintiff, the bill was amended by substituting John Albert Granger, Emma R. Granger (his wife), and Gideon Granger as parties defendant,

in the place of the defendant, Anna T. Granger, the mother of the said John Albert Granger and Gideon Granger, who died prior to the filing of the bill.

Motion to Dismiss the Bill.

The said defendants, John Albert Granger, Emma R. Granger and Gideon Granger now move to dismiss the bill, upon the grounds:

(1) That the bill does not present for determination a case or controversy within the original jurisdiction of this Court;

(2) That the bill does not state facts sufficient to constitute a valid cause of action in equity;

(3) That it appears upon the face of the bill that the plaintiff has an adequate remedy at law;

(4) That it appears upon the face of the bill that the right and title of sovereignty, government and jurisdiction over the lands described in the bill are in the State of New York and not in the plaintiff; that said lands have been taken for public use under the power of eminent domain and the laws of the State of New York and are now in the possession of the City of Rochester, a municipal corporation and a political subdivision of the State of New York, under and by virtue of an order of the Supreme Court of the State of New York; that the Supreme Court of the State of New York is now proceeding judicially to determine the ownership and value of said lands and to award just compensation therefor to the true owners; and that the judgment of said Supreme Court of the State of New York has not yet been rendered.

The Bill of Complaint.

The action is brought by the Commonwealth of Massachusetts against the State of New York, the City of Rochester, the Clerk of Monroe County, New York, the three Commissioners of Appraisal appointed by the Supreme Court of the State of New York in a proceeding to condemn the land described in the bill, for public use, and several corporate and individual defendants.

The bill alleges in substance (p. 7 *et seq.*) that certain grants of land in America were made in the 17th century by British sovereigns to the Duke of York and Albany, the Council of Plymouth and the Province of Massachusetts Bay; that these grants extended westerly indefinitely, and in the western part of New York overlapped, so that when the Commonwealth of Massachusetts succeeded to the title, sovereignty and jurisdiction of the lands formerly of the Massachusetts Bay and Plymouth Colonies, and the State of New York succeeded to the title, sovereignty and jurisdiction of the lands granted to the Duke of York and Albany, a dispute arose between the two states over a large part of the land now forming the State of New York; that on account of the collision of description of the above mentioned grants, the Commonwealth of Massachusetts and the State of New York laid claim to the jurisdiction, sovereignty and pre-emptive right over the same land; that on December 16, 1786, the Commonwealth of Massachusetts and the State of New York settled their differences by executing the Hartford Treaty, by the terms of which the State of New York ceded, granted, released and

confirmed to the Commonwealth of Massachusetts the right of pre-emption of the soil from the native Indians, and all other the estate, right, title and property (*the right and title of government, sovereignty and jurisdiction excepted*), which the State of New York had in and to a large tract of land within the boundaries of the State of New York; that said Hartford Treaty provided *that no adverse possession of said lands for any length of time shall be adjudged a disseisin of the Commonwealth of Massachusetts;* that included in the lands so ceded by the State of New York to the Commonwealth of Massachusetts by the Hartford Treaty, were certain lands situated in the City of Rochester, County of Monroe and State of New York (described in the bill at p. 10) which are the subject of this action; and that the Commonwealth of Massachusetts has never divested itself of its title to said lands.

The bill further sets forth (p. 11 *et seq.*) the provisions of the Charter of the City of Rochester, granted by the State of New York, authorizing said City to acquire lands for public use by condemnation proceedings, under the power of eminent domain, and establishing the procedure in the Courts of New York for ascertaining the value of the lands so taken and for ascertaining and paying the compensation which ought justly to be made by the city to the owners of such lands and to persons having any estate, interest or easement therein or any lien, charge or encumbrance thereon, and the procedure by which said city is authorized to take and retain possession of such lands pending such proceedings.

The bill further alleges (p. 15 *et seq.*) that on April 13, 1920, in accordance with the provisions of said Charter and said Laws of the State of

New York, the City of Rochester instituted condemnation proceedings in the New York Supreme Court to acquire the parcel of land described in the bill, which constitutes the subject of this action, for public use; that the Commissioners of Appraisal, who are made defendants in this action, were duly appointed by the Supreme Court of the State of New York in said proceeding, pursuant to said Charter and Laws, with power and authority to ascertain and report the amount of compensation which the owners, tenants or occupants of said land and the rights and easements therein will be entitled to receive for the same; that the said Commissioners of Appraisal are now engaged in hearing proofs and are about to file their report as provided by said Charter; that the Commonwealth of Massachusetts has notified said Commissioners that they are without power to adjudicate the interests of the Commonwealth of Massachusetts in and to the said parcel of land; that said Commissioners are about to appraise the damage and compensation which the owners, tenants or occupants of said parcel of land shall severally be entitled to receive therefor, and are about to report that the same should be paid to parties other than the rightful owner of said parcel of land, to wit: the Commonwealth of Massachusetts.

The bill further alleges (p. 15 *et seq.*) that all of said proceedings were taken in accordance with the Laws of the State of New York. It does not allege any irregularity in said condemnation proceedings, but alleges (p. 6) that the Commonwealth of Massachusetts has appeared specially in said proceedings, apparently for the sole purpose of objecting to the jurisdiction of the Su-

preme Court of the State of New York to adjudicate the rights of the Commonwealth of Massachusetts in said parcel of land.

The bill further alleges (p. 19 *et seq.*) that various deeds have heretofore been executed, delivered and recorded, purporting to convey the premises described in the bill to certain individual and corporate defendants or their grantors or predecessors in title. The earliest of these deeds is alleged to have been executed and delivered by one William Sheldon, as Sheriff of Genesee County, to one Gideon Granger (the ancestor and predecessor in title of these moving defendants) on January 14, 1817 (p. 21). The bill alleges, with respect to each of the deeds so executed, delivered and recorded, that, being not void on its face, it creates an apparent defect in, and is a cloud upon, the title of the plaintiff, the Commonwealth of Massachusetts, and tends to make the said real property unmarketable.

So far as the allegations of the bill are concerned, each of the persons alleged to have executed deeds constituting clouds upon the title to said land appears to have been a stranger to the title.

The bill further alleges (p. 29) that the various proceedings taken in the New York Supreme Court, to condemn said land for public use, create an apparent defect in and constitute a cloud upon the title of the plaintiff.

In the prayer of the bill (p. 32) the plaintiff asks:

1. That a Writ of Injunction be issued by this Court restraining and enjoining all of the defendants herein from taking any further proceedings in the action brought to condemn said land in the

Supreme Court of the State of New York and from doing any other acts which may constitute or create a cloud upon the title of the plaintiff to said land pending this suit;

2. That on final hearing, such Writ of Injunction be made permanent;

3. That the alleged claims, titles, liens, encumbrances and interests, set forth and referred to in the bill, so far as they affect or refer to said parcel of land, or any part thereof, may be adjudged invalid and void and that it be adjudged that none of the defendants has any interest or estate in said property or any part thereof; that the plaintiff's title to said property be adjudicated and established and that it be adjudged and decreed that the plaintiff is the owner thereof in fee and that the defendants and each of them be forever barred from asserting or claiming any interest or estate therein;

4. In the alternative, that on final hearing the plaintiff's right to receive adequate compensation from the City of Rochester and the amount thereof, be adjudicated and established; and

5. That the plaintiff be granted other and further relief.

ARGUMENT.

POINT I.

The State of New York has the power of eminent domain over the lands described in the bill.

The bill alleges that the lands therein described lie within the boundaries of the State of New York and that the right and title of government, sovereignty and jurisdiction thereof, once claimed by Massachusetts, were expressly reserved to New York by the *Treaty of Hartford* (Mass. Perpetual Laws, 1789, p. 392; N. Y. State Senate Documents, 1873, Vol. 5, p. 216), entered into between New York and Massachusetts, prior to the adoption of the Constitution of the United States. By that treaty, the right and title of government, sovereignty and jurisdiction over the lands in question were not only reserved to New York, but were expressly ceded and granted to New York by Massachusetts, in the following language:

> "*First.* The Commonwealth of *Massachusetts* doth hereby cede, grant, release and confirm to the State of *New York* forever, all the claim, right and title which the Commonwealth of *Massachusetts* hath to the government, sovereignty, and jurisdiction of the lands and territories so claimed by the State of *New York* * * *."
>
> *Hartford Treaty, supra.*

This court will take judicial notice of all of the terms of that treaty even though they are not set forth in the bill.

> *Coffee* v. *Groover,* 123 U. S. 1, 11, *et seq.;*
> *Jones* v. *United States,* 137 U. S. 202, 214.

In *Rhode Island* v. *Massachusetts*, 12 Peters, 657, 727, this court held that

> "If there is a compact between the States, it settles the line of original right; it is the law of the case binding on the States and its citizens, as fully as if it had been never contested."

As the lands in question are within the territorial limits of the State of New York and as the State of New York has the right and title of government, sovereignty and jurisdiction thereover, it has the power to take said lands for public use by eminent domain.

Eminent domain is the sovereign right or power to resume possession of land within the State, for public use.

> *Beekman* v. *Saratoga etc. Co.*, 3 Paige (N. Y.) 45, 73.

It is an "incident to sovereignty," a power "which belongs to every independent government."

> *Cincinnati* v. *Louisville & Nash. R.R. Co.*, 223 U. S. 390, 404.

A state cannot divest itself of so vital a governmental power as the power of eminent domain over land within its borders.

> *Penn. Hospital* v. *Philadelphia*, 245 U. S., 20.

Land owned by one state, within another state, is held by the owner subject to all of the incidents of private ownership, including eminent domain.

Burbank v. *Fay*, 65 N. Y., 57;
Smith v. *City of Rochester*, 92 N. Y., 463, 477.

Having divested itself of the right and title of government, sovereignty and jurisdiction over the land described in the bill, the Commonwealth of Massachusetts is merely a private proprietor thereof. All private rights within the territorial limits of a state, are subordinate to the power of eminent domain.

Cincinnati v. *Louisville & Nash. R.R. Co.*, *supra.*
West River Bridge Co. v. *Dix*, 6 How., 507.

Lands owned by one sovereign within the jurisdiction and territorial limits of another sovereign may be taken by the latter by eminent domain.

United States v. *Railroad Bridge Co.*, 27 Fed. Cas. #16114 (6 McLean 517);
Union Pacific R. Co. v. *Leavenworth etc. Co.*, 29 Fed. 728;
Northern Pacific R. R. Co. v. *St. Paul*, 3 Fed. 702;
Union Pacific R. Co. v. *Burlington etc. Co.*, 3 Fed. 106.

In *Wadsworth* v. *Buffalo Hydraulic Association*, 15 Barb. (N. Y.) 83, the court, referring to the rights of Massachusetts and New York under the *Treaty of Hartford*, said at page 95:

> "It seems to me that the right granted to Massachusetts in 1786, to purchase the lands of the Indians, was, and always has been, subject to the right of the state to take and appropriate for public use, the lands to which the right of purchase attached; otherwise a portion of the territory of the state would be beyond its 'right of sovereignty.'"

The laws of the State of New York are applicable to all of the lands within its borders.

Harrison v. *Fite*, 148 Fed. 781.

By entering into the *Treaty of Hartford*, the Commonwealth of Massachusetts will be assumed to have consented that the land described in the bill should be governed and dealt with "according to the law of the state in which the land lies."

Oklahoma v. *Texas*, 42 Sup. Ct. Rep. 406, 414.

POINT II.

The Supreme Court of New York has jurisdiction of the condemnation proceedings pending therein.

"Jurisdiction" over the lands described in the bill was expressly reserved and ceded to the State of New York by the *Treaty of Hartford*.

The courts of every sovereign state have jurisdiction of proceedings to acquire lands within

that state for public use, under the power of eminent domain.

The bill sets forth many of the statutes of the State of New York relating to the jurisdiction of the Supreme Court of that state to hear and determine proceedings in condemnation. This Court will take judicial notice of all other laws of the State of New York relating to such jurisdiction.

> "When exercising an original jurisdiction under the Constitution and Laws of the United States, this court, as well as every other court of the National Government, doubtless takes notice, without proof, of the laws of each of the United States."
>
> *Hanley* v. *Donoghue*, 116 U. S. 1, 6.

See also:

> *Owings* v. *Hull*, 9 Peters 607;
> *Lamar* v. *Micou*, 112 U. S. 452.

The plaintiff does not contend that the Supreme Court of New York is without jurisdiction of the subject matter of the condemnation proceedings but denies the jurisdiction of that court over the Commonwealth of Massachusetts.

As the condemnation proceedings are *in rem*, the court has complete jurisdiction of the cause, regardless of who may own or claim an interest in the lands. Its jurisdiction cannot be defeated by reason of the fact that one claimant is a sovereign state, over which the court has no control, nor by the refusal of such state to submit to the jurisdiction of the court.

Nor can the refusal of the Commonwealth of Massachusetts to submit to the jurisdiction of the Supreme Court of New York, prevent that court from determining the value of any interest that

the Commonwealth of Massachusetts may have in the lands taken for public use and awarding compensation therefor.

> "When a court has jurisdiction, it has a right to decide every question which occurs in the cause."
>
> *Buffalo & S. L. R. Co.* v. *Supervisors of Erie County*, 48 N. Y., 93, 98.

POINT III.

This Court will not enjoin the condemnation proceedings pending in the Supreme Court of the State of New York.

The principal relief prayed for by the plaintiff is a Writ of Injunction restraining "all of said defendants taking any further proceedings in said condemnation proceedings" pending in the Supreme Court of the State of New York.

The Judicial Code, Section 265, provides as follows:

> "The Writ of Injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The prohibition of that Section of the Judicial Code applies to this Court as well as to the inferior courts of the United States.

> *Slaughter-House Cases*, 10 Wall. 273, 298.

Irrespective of the Judicial Code, no Federal Court will enjoin the prosecution of an action *in rem* pending in a State Court, of which the latter has jurisdiction.

> *Essanay Film Mfg. Co.* v. *Kane* (U. S. Sup. Ct., Oct. Term, 1921), Adv. Op. 1921-1922, ‡13 p. 395;
> *Farmers' Loan & Trust Co.* v. *Lake Street R. Co.*, 177 U. S. 51;
> *Kline* v. *Burke Construction Co.* (U. S. Sup. Co. Oct. Term, 1922), Adv. Op. 1922-1923, ‡4 p. 91.

This is especially true where the State Court has actually seized the *res*, under judicial process, as in the case at bar. The bill alleges (p. 17):

> "That on the 26th day of April, 1920, the said Supreme Court (of New York) entered an order authorizing the said City of Rochester to take immediate possession of the real estate, rights and easements sought to be taken (in the condemnation proceedings), and that the City of Rochester thereafter took possession of the real estate, rights and easements in the said lands hereinbefore described."

In *Essanay Film Mfg. Co.* v. *Kane, supra,* this Court said at page 397:

> "Since 1793, the prohibition of the use of injunction from a Federal Court to stay proceedings in a State Court has been maintained continuously and has been consistently upheld."

The bill alleges upon information and belief (p. 18) that the Commissioners of Appraisal

> "are about to appraise the damage and compensation which the owners, tenants or oc-

> cupants of the lands and buildings taken have sustained by being deprived thereof and the amount of compensation which they shall severally receive therefor, and are about to report that the same should be paid to parties other than the rightful owner of the land, to wit: your plaintiff."

That allegation is not sufficient to warrant the granting of a Writ of Injunction to restrain further proceedings in the New York Supreme Court, because this Court will assume that the New York Court, its Commissioners of Appraisal, and the City of Rochester, will proceed legally under the power of eminent domain.

> *Galveston Wharf Co.* v. *Galveston* (U. S. Sup. Ct. Oct. Term 1922),
> Adv. Op. 1922-1923, #7, p. 210.

The determination of the question as to who is entitled to a right of preemption of the soil is a judicial function and will not be restrained.

> *Litchfield* v. *Richards,* 9 Wall. 575.

POINT IV.

The Commonwealth of Massachusetts, not being in possession of the lands described in the bill, cannot sue to remove a cloud from its alleged title.

An owner of real estate, in possession of another, cannot maintain a bill in equity to remove a cloud from the title.

> *Frost* v. *Spitley,* 121 U. S. 552;
> *Dick* v. *Foraker,* 155 U. S. 404, 414.

In *Frost* v. *Spitley supra,* this court said at page 556:

> "A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and then bring ejectment."

That rule has been uniformly followed by this court except as to lands in states where the rule has been changed by statute, permitting an owner, out of possession, to maintain an action to remove a cloud from the title.

> *United States* v. *Wilson,* 118 U. S. 86;
> *Fussell* v. *Gregg,* 113 U. S. 550.

There is no such statute in New York, but on the contrary the New York statutes require, not only that the lands shall be in the possession of the plaintiff at the time of the commencement of such action, but that they shall have been in his possession for at least one year prior to the commencement of the action.

Real Property Law (N. Y.) Section 500 provides as follows:

> "Where a person has been or he and those whose estates he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant

might make to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount or value of not less than two hundred and fifty dollars. But this section does not apply to a claim for a dower.

Section 501 of the same law provides that:

"The complaint in such an action must set forth facts showing: * * *

"That the property, at the commencement of the action was, and, for the one year next preceding, has been in his possession, or in the possession of himself and those from whom he derives his title, either as sole tenant, or as joint tenant, or as tenant in common with others."

The bill alleges (p. 17) that the City of Rochester has taken possession of the lands therein described, under an order of the New York Supreme Court in the condemnation proceedings and therefore it appears upon the face of the bill that the Commonwealth of Massachusetts has no cause of action for removing any cloud from its alleged title or for the determination of its alleged claim to the lands described in the bill.

POINT V.

The bill does not allege facts sufficient to show any cloud upon the alleged title of the Commonwealth of Massachusetts.

It appears upon the face of the bill (p. 19 *et seq.*) that all of the deeds and other instruments alleged to constitute clouds upon the title of the plaintiff, were made, executed, delivered and recorded by strangers to the title. Each of said instruments is therefore void upon its face and constitutes no cloud upon the title.

If a deed is void on its face, the interference of a court of equity is unnecessary.

> *Hannewinkle* v. *Georgetown,* 82 U. S. 547;
> *Mackall* v. *Casilear,* 137 U. S. 556, 564;
> *Rich* v. *Braxton,* 158 U. S. 375;
> *Townsend* v. *New York,* 77 N. Y. 542.

A deed executed and recorded by a stranger to the title, is void upon its face and does not constitute a cloud upon the title of the real estate described therein.

> *Ward* v. *Dewey,* 16 N. Y. 519;
> *Welden* v. *Stickney,* 1 App. D. C. 343;
> *Thompson* v. *Etowah Iron Co.,* 91 Ga. 538;
> *Pixley* v. *Huggins,* 15 Cal. 127.

The grantee named in a deed given by a stranger to the title can never acquire any title thereunder, to the lands described in the bill, as against the Commonwealth of Massachusetts, for the reason:

"That the terms of the Treaty (of Hartford) provided, in the seventh clause thereof, that no adverse possession of the said lands for any length of time shall be adjudged a disseizin of the Commonwealth of Massachusetts."

Bill, p. 9; *Hartford Treaty*, 7th Clause.

For that reason, the case at bar is distinguishable from the case of *Graves* v. *Ashburn*, 215 U. S. 331, wherein it was held that the plaintiff was entitled to maintain a bill in equity against one claiming lands under a deed executed by a stranger to the title, where, under a statute of the State of Georgia, in which such lands were located, possession thereof by the grantee for seven years would vest the title in him.

POINT VI.

The plaintiff has an adequate remedy at law.

It appears from the allegations of the bill that an action is pending in the Supreme Court of the State of New York wherein the Commonwealth of Massachusetts can fairly present its title and obtain an adjudication thereof, if it wishes to submit to the jurisdiction of that court, and no special reason is shown for interference of a court of equity.

Where a party has a complete defense to an action at law, he cannot maintain a bill to enforce his rights without showing some special reason for the interference of a court of equity.

Huntington v. *Allen*, 44 Miss. 654;
Chamberlain v. *Marshall*, 8 Fed. 398;
Moran v. *Palmer*, 13 Mich. 367.

The Commonwealth of Massachusetts has only a legal right to recover just compensation for the land taken and this court will not enjoin the condemnation proceedings, for the reason that the plaintiff has an adequate remedy at law.

D. M. Osborne & Co. v. *Mo. Pacific R. R. Co.*, 147 U. S. 248.

A bill in equity to enjoin an action in another court, cannot be maintained where it appears from the bill that the complainant has a perfect legal defense to such action.

Deweese v. *Reinhard*, 165 U. S. 386.

> "There can be no reason or propriety in appealing to a court of equity to restrain proceedings that are being conducted in other courts, competent to construe the statutes under which they act, and to decide every question that may arise in the course of the proceeding."

Wilson v. *Lambert*, 168 U. S. 611, 618.

After praying for an injunction to restrain the condemnation proceedings and for judgment removing the alleged clouds from the title, the plaintiff prays (p. 33):

> "In the Alternative, that on final hearing the plaintiff's right to receive adequate compensation from the defendant City of Rochester, and the amount thereof, be adjudicated and established."

The New York Supreme Court, which has already taken jurisdiction of the subject of the action, and has seized the *res*, has adequate and

complete jurisdiction and power to determine the validity of the claim of the Commonwealth of Massachusetts and to award adequate compensation for the land taken. If the allegations of the bill are true, the Commonwealth has an adequate and complete remedy at law, in the New York Supreme Court, where the condemnation proceedings are pending and there is no reason shown for the interference of a court of equity.

Article 1, Section 6 of the Constitution of the State of New York provides, "Nor shall private property be taken for public use without just compensation."

This court will not assume that the New York Supreme Court will act contrary to the Constitution of that State.

POINT VII.

This Court has not jurisdiction of the subject of the action.

> "Notwithstanding the comprehensive words of the Constitution, the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens."
>
> *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 287.

In *Kline* v. *Burke Instruction Co., supra* (p. 92), this Court said that in actions *in rem*

> "where the jurisdiction of the State Court has first attached, the Federal Court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the State Court's jurisdiction."

The subject matter of the bill in the case at bar involves the sovereignty and jurisdiction of the State of New York and the right of that state to exercise the power of eminent domain over lands within its borders. It is a political controversy, of which this Court will not entertain jurisdiction.

> *State of Rhode Island* v. *State of Mass.*, 12 Peters, 657;
> *State of Georgia* v. *Stanton*, 6 Wall., 50;
> *Cherokee Nation* v. *Georgia*, 5 Peters, 1.

In *Cherokee Nation* v. *Georgia, supra*, a bill was filed in this court, in behalf of the Indians, for an injunction to prevent the execution of certain acts of the legislature of Georgia, within the territory of the Cherokee Nation (in the State of Georgia). The acts of the legislature, if permitted to be carried into execution, would have subjected the Cherokee Nation to the jurisdiction of the State. The injunction was denied on the ground that the plaintiff could not be regarded as a foreign nation, and therefore had no right to file the bill. But Chief Justice Marshall, who delivered the opinion of the Court, strongly intimated that this Court was without jurisdiction on the further ground that the question presented was political. He said at page 20:

> "The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

The case at bar is not a boundary dispute. The complainant admits that the land claimed by it is within the territorial jurisdiction of the State of New York. The bill, therefore, presents the political question of whether the State of New York shall exercise the power of eminent domain over land within that State, the proprietary ownership of which is claimed by a sister State. This Court is without jurisdiction to decide that question.

POINT VIII.

The bill should be dismissed.

Where a bill of complaint filed by a sovereign state does not state facts sufficient to constitute a cause of action within the original jurisdiction of this Court, the bill will be dismissed on motion.

Texas v. *Interstate Commerce Commission,* (U. S. Sup. Ct. Oct. Term, 1921) Adv. Op., 66 L. Ed. 310;
N. Dak. ex rel. Lemke v. *Chicago & N. W. R. Co.* (Sup. Ct. Oct. Term 1921) Advance Op. 66 L. Ed. 199;
State of Ga. v. *Stanton, supra;*
State of Rhode Island v. *State of Mass., supra,* p. 669.

Respectfully submitted,

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